Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JANET CAMPBELL,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the overlap between (1) California's False Claims Act and "whistleblowing" statutes expressly affording University of California employees a judicial remedy for injuries resulting from reporting their employer's violations of state and federal law; (2) the internally-promulgated whistleblowing policy of an employer with which this Court is well familiar - the Regents of the Univ. of California (Respondent). *Hamilton v. Regents of Univ. of California* (1934) 293 U.S. 245 (*Hamilton*); *Univ. of California Regents v. Bakke* (1978) 438 U.S. 265 (*Bakke*); and *Regents of the Univ. of California v. DOE* (1997) 519 U.S. 425; and (3) a judicially-created rule of administration with which this Court is also well familiar - the exhaustion of administrative remedies doctrine (Exhaustion Doctrine). *Patsy v. Board of Regents* (1982) 457 U.S. 496 (*Patsy*). This case also concerns a state's highest court that has *unilaterally, unanimously* and *without precedent* expanded the reach of the Exhaustion Doctrine in a manner communicating to its citizens and government whistleblowers that, despite compelling state interests to the contrary, there are windows in the State of California where Justice BRANDEIS'S highly-esteemed and widely-available brand of "disinfectant" will not be permitted to shine.

The Question Presented is:

Whether a UC Whistleblower is denied equal protection of the laws by the Lower Courts' imposition of the Exhaustion Doctrine to bar her statutory claims in a court of law because she didn't *go back* after termination to *internally* grieve her employer's violations of state and federal law?

PARTIES TO THE PROCEEDING

Janet Campbell was the Plaintiff in the Superior Court of the State of California, County of San Francisco (Case No. 312736); Appellant in the Court of Appeal, First Appellate District (Case No. A097560) and Appellant in the California Supreme Court (Case No. S113276). The Regents of the Univ. of California was the Defendant in the Superior Court; and the Respondent in the Court of Appeal and Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual Background 3

B. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 13

I. THE LOWER COURTS' IMPOSITION OF THE EXHAUSTION DOCTRINE WITHOUT PRECEDENT OR JUSTIFICATION BURDENS FREE SPEECH IN MATTERS GOING TO THE CORE OF PUBLIC CONCERN 17

A. Imposition of the Exhaustion Doctrine Without Statutory Mandate or Precedent Renders California "Whistleblower" Law a Regulatory Maze 20

B. Imposition of the Exhaustion Doctrine Without Statutory Mandate or Precedent Constitutes Content-Based Viewpoint Discrimination Subject to Strict Scrutiny 22

C. Imposing the Exhaustion Doctrine Contravenes the Express Purpose of the Statutes - UC Employee's Freedom to Whistleblow - Without Serving a Compelling Interest in the Efficiency of the Public Service Respondent Performs - Education of Our Young and Research for the Benefit of the Public 24

II. THE DECISION BELOW HOISTS SUBSTANTIAL PROCEDURAL AND ECONOMIC BURDENS ON UC WHISTLEBLOWERS CONFLICTING WITH THIS COURT'S EQUAL PROTECTION JURISPRUDENCE 26

III. THIS COURT HAS ALREADY DEFINED THE OUTER LIMIT OF RESPONDENT'S AUTHORITY AND COMPETENCE UNDER THE LAW 29

CONCLUSION 30

APPENDICES

Appendix A: *Campbell v. Regents of Univ. of California* (2005) 35 Cal.4th 311 . . . . . 1a

Appendix B: *Campbell v. Regents of Univ. of California*, (No. A097560) Unpublished Opinion 28a

Appendix C: Judgment of Dismissal, Superior Court of California, Country of San Francisco 45a

Appendix D: Order Denying Petition for Rehearing 47a

Appendix E: Cal. Gov. Code, § 12650 et seq 48a

Appendix F: Cal. Labor Code, , § 1102.5 et seq . . . 69a

Appendix G: University of California Reporting Improper Governmental Activities and Protection Against Retaliation (*Whistleblowing/Retaliation Policy*) (Revised 10/7/98) 73a

TABLE OF AUTHORITIES

PAGE

CASES

Amluxen v. Regents of Univ. of California,
53 Cal.App.3d 27 (1975) 10

Apte v. Regents of the Univ. of California,
198 Cal.App.3d at 1092 (1988) 10, 18

Bodie v. Connecticut, 401 U.S. 371 (1971) 28

Broussard v. Regents of the Univ. of California,
131 Cal.App.3d 636 (1982) 9, 10

Brown v. City of Los Angeles,
102 Cal.App.4th 155 (2002) 22

Campbell v. Regents of Univ. of California,
35 Cal.4th 311 (2005) 1, 19

Ciba-Geigy Corp. v. Alza Corp.,
804 F.Supp. 614 (1992) 9, 19

Coleman v. Regents of Univ. of California,
93 Cal.App.3d 521 (1979) 9

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 16, 21

Hamilton v. Regents of the Univ. of California,
293 U.S. 245 (1934) 18, 19

Ishi v. Regents of Univ. of California,
... Cal.App.2d 854 (1968) ..... *passim*

Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589 (1967) 20, 24

Lindsey v. Normet,
405 U.S. 56 (1972) 17, 27, 28, 29

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 27, 28

Madey v. Duke,
307 F.3d 1351 (Fed. Cir. 2002),
cert. denied, 123 S. Ct. 2639 (2003) 13, 15, 16

Mendoza v. Regents of Univ. of California,
78 Cal.App.3d 168 (1978) 11

N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 20

Neary v. Regents of Univ. of California,
185 Cal.App.3d 1136 (1986) 14

Neary v. Regents of Univ. of California,
3 Cal.4th 273 (1992) 15

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 17

Palmer v. Regents of University of California,
107 Cal.App. 4th 899 (2003) 26

Patsy v. Board of Regents,
457 U.S. 496 (1982) 2, 8, 21, 22

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968) 25

Police Dept. of Chicago v. Mosley,
408 U.S. 92 (1972) 7, 8, 23

In re Quarles,
158 U.S. 532 (1895) 12, 13, 17, 22

Regents of Univ. of California v. Bakke,
438 U.S. 265 (1978) 13, 29, 30

Regents of the Univ. of California v. City of Santa Monica, 77 Cal.App.3d 130 (1978) 19

Regents of the Univ. of California v. DOE,
519 U.S. 425 (1997) i

In re Royer, 123 Cal. 614 (1899) 18, 19, 22

San Francisco Labor Council v. Regents of Univ. of California, 26 Cal.3d 785 (1980) 19

Schifando v. City of Los Angeles,
31 Cal.4th 1074 (2003) 11-12

Tameny v. Atlantic Richfield Co.,
27 Cal.3d 167 (1980) 26

Unix System Labs v. Berkeley Software Design,
832 F.Supp. 790 (1993) 19

CONSTITUTION

Cal. Const. Article IX, § 1, subd. (a) 2
Cal. Const. Article IX, § 9, subd. (a) 23
Cal. Const. Article IX, § 9, subd. (f) 23

STATUTES

28 U.S.C. § 1257 1
35 U.S.C. § 200-212 13
Cal. Code of Civ. Proc., § 1094.5 10
Cal. Gov. Code, § 11340 9
Cal. Gov. Code, § 11349(a) – (f) 9
Cal. Gov. Code § 11500 *et seq* 9
Cal. Gov. Code, §11512 9
Cal. Gov. Code, §11513 9
Cal. Gov. Code, §12650 *et seq* 1
Cal. Gov. Code, §12652.5 2
Cal. Gov. Code, § 12653 . . . . . 4, 5, 6, 21, 23
Cal. Gov. Code, § 12940 *et seq* 12
Cal. Labor Code, § 1102.5 . . . . . *passim*
Cal. Labor Code, § 1106 2

Miscellaneous:

Goldie Blumenstyk, *Reviewers Give Thumbs Down to Corporate Deal at Berkeley*, The Chronicle of Higher Education v. 50 (Aug. 6, 2004) 21

Eyal Press and Jennifer Washburn, *The Kept University*, Atlantic Monthly v. 285 (March 2000) 14

Robert van den Bosch, *The Pesticide Conspiracy* (Univ. of California Press, 1978) 14, 20

Sharon Walsh, *Berkeley Denied Tenure to Ecologist Who Criticized University's Ties to the Biotechnology Industry*, The Chronicle of Higher Education, v. 50 (Jan. 9, 2004) . . . 20

Janet Campbell respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court.

OPINION BELOW

The opinion of the California Supreme Court (App. A, *infra*, 1a - 27a) is reported at 35 Cal.4th 311. The opinion of the First Appellate District Court of Appeal, (App. B, *infra*, 28a - 44a) was an unpublished opinion.

JURISDICTION

The judgment of the California Supreme Court was filed on March 7, 2005. The Petition for Rehearing was denied on May 18, 2005. App. D, *infra*, at 47a. The jurisdiction of this Court is invoked under 28 USC § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The U.S. Constitution's First Amendment provides: "*Congress shall make no law . . . abriaging the freedom of speech. . .* "

2. The Fourteenth Amendment provides: "*No State shall make or enforce any law which shall; . . . deny to any person within its jurisdiction the equal protection of the laws.*"

3. California's "False Claims Act," Cal. Gov. Code, §12650 *et seq.*, is at App. E, *infra*, at 48a.

4. California's "whistleblower" statute, Cal. Labor Code, § 1102.5 *et seq.*, is at App. F, *infra*, at 69a.

5. Respondent's *"Whistleblowing/Retaliation" Policy* is at App. G, *infra* at 73a.

STATEMENT

This case concerns the overlap between California's False Claims Act (FCA) and whistleblower statutes affording

University of California (UC) employees a judicial remedy for injuries resulting from reporting their employer's violations of law; the employer's internally-promulgated policy on whistle blowing (the UC Policy) and a judicially-created rule of "administration" with which this Court is well familiar - the exhaustion of internal administrative remedies doctrine (Exhaustion Doctrine). *Patsy v. Board of Regents* (1982) 457 U.S. 496, 518. (*Patsy*). This case also concerns a state's highest court that has *unilaterally*, *unanimously*, and without precedent decided that there are windows in the State of California where Justice BRANDEIS' highly-esteemed and widely-available brand of 'disinfectant" should not be allowed to shine,[1] even if said windows are within ivory towers built by the state for the *intellectual, scientific, moral and agricultural improvement* of the people of the State of California based on the express premise that a "general diffusion of knowledge and intelligence is essential to the rights and liberties of the people." Article IX, § 1, subd. (a).

In the courts below, Appellant has argued that, under the subject statutes, a UC Whistleblower does not have to *go back* after her employment has been terminated to *internally grieve* her former employer's own violations of state and federal law[2] and that requiring her to do so not only burdens

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[1] See Louis D. Brandeis, *Other People's Money and How the Banker's Use It* (Bedford Books of St. Martin's Press 1933) (1914) wherein his famous quote, "Sunlight is said to be the best of disinfectants," addressed concern for the lack of effective oversight, unbridled authority and corrupt opportunism of corporate managers - a concern equally disconcerting under facts involving the 'for (personal) profit' activities of administrators in a public university setting.

[2] *See*, Cal. Gov. Code, §12652.5 where "political subdivision" is defined to include the University of California, App. E, *infra*, at 64a ; and Cal. Labor Code, § 1106 where "employee" is defined to include University of California employees, App. F, *infra*, at 72a.

protected speech but is a burden that private employees do not share, thus depriving UC Whistleblowers equal protection of the laws. Said arguments received short shrift in the courts, below. Appellant learned that, despite the fundamental rights at stake, including a UC whistleblower's protected speech on matters going to the core of public concern and her right to access a court of law, "[e]mployees of a constitutionally-created entity are *not the same* as employees in the private sector." App. B, *infra*, at 42a (emphasis added).

A. Factual Background

Appellant was a Senior Architect in the Architectural Design and Engineering Unit of the Facilities Management Department (FMD) at UC San Francisco (UCSF) responsible for reviewing architectural plans and specifications for construction projects under $250,000 to ensure UCSF building projects complied with applicable legal requirements. *Id.* at 29a – 30a. In 1991, Appellant's supervisor began to instruct her to prepare bid documents that illegally limited competition. *Id.* at 30a. Among other things, the bid documents used restrictive specifications; specified products by brand name only; included performance specifications in excess of those actually needed for a job; and used "*other restrictive requirements that limited competition to one manufacturer of roofing products and their small number of certified contractors.*" *Id.* Appellant protested on several occasions over the years that FMD's use of these bid documents as ordered by her Supervisor violated state competitive bidding laws applicable to public contractors. *Id.* at 31a.

In 1997, Appellant reported FMD's ongoing violations to the Federal Bureau of Investigation (FBI). An FBI investigator questioned UCSF officials about the violations reported by Appellant. App. B, *infra*, at 31a. Respondent immediately retaliated against Appellant by changing her job

assignment, removing her from "meaningful and substantial work," and leaving her with "menial and lesser projects." *Id.* Appellant soon had to go on extended disability leave. *Id.* Upon her return, she was almost immediately terminated, being told it was "due to downsizing." Appellant alleged that she was "*selected from among several co-workers for termination under irregular circumstances in which. . . [l]ess senior and less qualified co-workers were retained in preference to her,*" and that her termination was in retaliation for reporting wrongdoing at UCSF to the FBI. *Id.*

After her termination Appellant filed a grievance under UCSF's Personnel Policies for Staff Members (PPSM). Appellant alleged, among other things, that she was discharged in retaliation for being a whistleblower. *Id.* at 32a. A UCSF staff member responded *seven weeks later* (Zuzofsky Letter). In pertinent part, the Zuzofsky Letter stated:

> *"Allegations of retaliation for whistle blowing activity fall outside of the scope of the PPSM and, therefore, are excluded from the complaint resolution process. Such complaints are properly filed under the UCSF Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities, a copy of which is enclosed with this letter. Alleged violations of state and federal laws will be excluded from the complaint resolution process." Id.*

B. Proceedings Below

1. In June, 2000, Appellant filed a whistleblower complaint against Respondent in San Francisco Superior Court for retaliatory termination under Cal. Gov. Code, § 12653 and Cal. Labor Code, § 1102.5. *Id.* at 33a. Appellant alleged her report to the FBI concerned "a matter of public concern," violations of state laws and regulations

and, *not the terms and conditions of her employment*. *Id.* at 31*a* (emphasis added). Appellant also alleged that Respondent knew Appellant was the FBI informant. *Id.* Respondent demurred on the ground that Appellant's failure to re-file a whistleblowing grievance precluded her statutory remedy under the Exhaustion Doctrine. *Id.* The trial court sustained, granting leave to amend to allege either that the Exhaustion Doctrine was fulfilled or that an exception excused her from its application. *Id.* at 33 - 34a.

Appellant's first amended complaint alleged she filed an internal complaint but, Cal. Gov. Code § 12653 and Cal. Labor Code, § 1102.5, didn't require her to exhaust UCSF's internal administrative remedies as a jurisdictional prerequisite; and that the Zuzofsky Letter informed her that whistleblowing claims were outside the scope of the grievance procedures and were therefore excluded. App. B, *infra*, at 34a. Respondent again demurred. The trial court sustained with leave to amend to plead the futility doctrine and that Appellant wasn't notified of the grievance procedures. *Id.*

Appellant filed a second amended complaint alleging that the Zuzovsky Letter informed her that the whistleblowing allegations were outside the scope of the grievance procedures and were excluded; and that the Zuzofky Letter did *not* tell her that failure to grieve those claims would preclude her statutory claims. *Id.* at 35a. Appellant also alleged that the UC Policy language wasn't mandatory by its terms and Respondent was estopped from raising the Exhaustion Doctrine defense. *Id.* at 37a. Respondent again demurred on the grounds that Appellant failed to allege that exhaustion would've been futile and that Appellant was properly advised of applicable grievance procedures. The trial court sustained Respondent's demurrer *without* leave to amend, entered judgment in its favor, and awarded Respondent its costs of suit. App. C, *infra*, at 45a.

2. On appeal, Appellant argued in her Opening Brief that any interpretation of Cal. Gov. Code, §12653 and Cal. Labor Code, § 1102.5 that treated injured UC employees differently from all other similarly-situated whistleblowing employees violates the Equal Protection Clause and must be reviewed under the "strict scrutiny" test. In an unpublished opinion, the Court of Appeal adopted no level of scrutiny whatsoever, summarizing Appellant's equal protection argument in the following terms:

> *As we understand her argument, appellant claims (1) section 12653 does not require exhaustion of administrative remedies, but (2) the trial court in essence ruled that it does require exhaustion in the case of University of California (UC) employees, thereby (3) treating UC employees differently from non-UC employees suing under the statute.* App. B, *infra,* at 42a.

The Court found the first premise flawed based on its earlier reasoning that the Legislature's omission of any reference to the Exhaustion Doctrine did not evidence its intent to allow an injured worker to bypass the employer's internal administrative remedy and proceed directly to court. *Id.* Specifically,

> *"Every statute authorizing or confirming a right to seek legal redress does not have to contain a specific mention of the exhaustion requirement, which is fundamental to administrative law. . . By authorizing legal action, the Legislature contemplates the necessary (and jurisdictional) precondition to that action - the exhaustion of administrative remedies." Id.*

Appellant's Equal Protection Clause argument was also

summarily disregarded by the Court, which concluded:

> "*. . . all employees of the Regents are treated in the same way with the same exhaustion of remedies requirement. Employees of a constitutionally created entity are not the same as employees in the private sector. There is no equal protection violation here.*" *Id.* at 42a (emphasis added).

3. The California Supreme Court granted Appellant's petition for review. In her *Brief on the Merits*, Appellant argued that applying the Exhaustion Doctrine to UC Whistleblowers while allowing private sector employees to proceed directly to court with the same statutory claims when both classes of citizens spoke out on matters of public concern is problematic either as a matter of free speech *or* equal protection. Appellant cited *Police Dept. of Chicago v. Mosley* (1972) 408 U.S. 92 (*Mosley*) for the proposition that a State's distinction between classes of expression in terms of subject matter (in that case, labor v. non-labor picketing) is an impermissible content-based restriction, *Id.* at 94, because it engrafts special prohibitions on public sector speakers who express views on disfavored subjects - in this case against illegal government activity. Furthermore, given the fundamental rights at stake, the Equal Protection Clause requires strict scrutiny assuring the classification is narrowly tailored. *Id* at 101.

In an unanimous opinion the Cal. Supreme Court affirmed, holding that Appellant should have exhausted Respondent's internal grievance procedures before proceeding to suit. App. A, *infra*, at 27a. Appellant's constitutional concerns were again summarily discounted by the Court, which reasoned that, "*requiring public employees to exhaust their administrative remedies as a prerequisite to pursuing their claims of retaliatory discharge in superior court does not*

restrict their freedom to disclose false claims." [3] *Id.* at 26a (emphasis added). Though the specific state interests or policy concerns compelling its decision were not specifically weighed,[4] the Court did offer its unsubstantiated belief that "judicial efficiency" will still be promoted by mandatory internal administrative proceedings, ". . . *by unearthing the relevant evidence and by providing a record which the court*

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[3] This is tantamount to saying that if the *Mosley* picketer's government employment as a federal postal employee was terminated under his employer's internal policies prohibiting picketing against racial discrimination off the worksite, out of uniform, and during his lunch break rather than threatened prosecution under the city ordinance, this Court would have found no violation of the Equal Protection Clause because he was always free to picket at a high school in Springfield. *Mosley*, supra, 408 U.S. at 93.

[4] See practical questions posed by this court in *Patsy, supra*, 457 U.S. at 513 - 514, a § 1983 case also arising in a public university setting, specifically noting difficulty with the Exhaustion Doctrine's *design* and *scope* when constitutional rights are at stake, including standards for judging the kind of administrative procedures that should be exhausted; tolling requirements and time limitations; res judicata and collateral estoppel effect; consequences attaching to failure to comply with procedural requirements, and the availability of interim injunctive relief. *Id.* As further discussed herein, these considerations are even more compelling in a case where the employee was terminated and thus should no longer be subject to the *internal* regulations of her former employer; the university's violations of state and federal law are inextricably intertwined with adjudication of the former employee's termination; there is substantial 'leeway' in the administrative procedures of the wrongdoer (see, *infra*, n. 5) and reinstatement and promotion in reward for a whistleblower's diligence and good citizenship is no longer a viable option because the employer's highest rungs have alternatively chosen to ratify the retaliatory and illegal conduct.

may review."[5] *Id.* at 11a - 12a.

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[5] Any internally-generated "record" resulting from Respondent's administrative proceedings must also be strongly questioned. Because of its autonomy afforded under art. IX, § 9 of the California Constitution (art. IX, 9), Respondent's quasi-legislative and quasi-judicial procedures are not governed by the *California Administrative Procedures Act*, (*CAPA*), Cal. Gov. Code, § 11340 *et seq.*, and Cal. Gov. Code, § 11500 *et. seq*, respectively. *Broussard v. Regents of the Univ. of California* (1982) 131 Cal.App.3d 636, 639. As a partial result, no oaths are taken in the course of Respondent's quasi-judicial proceedings, *Id.* Furthermore, for *non*-academic employees Respondent's hearing officers are other UC employees that are not chosen by the aggrieved employee, *Ishimtasu v. Regents of Univ. of California*, 266 Cal.App.2d 854, 857. In sharp contrast, hearing officers afforded by administrative agencies bound by the CAPA are on the staff of the independent *Office of Administrative Hearings*, are required to be attorneys admitted to practice for at least 5 years who preside at the hearing and rule on matters of law, and may be disqualified if a fair and impartial decision cannot be rendered. Cal. Gov. Code, §11512. Oral evidence is also taken on oath or affirmation although rules of evidence are not strictly applied. Cal. Gov. Code, §11513. It is also important to note that all of Respondent's policies are promulgated outside of the procedural safeguards of the CAPA by its Office of the President, *Coleman v. Regents of Univ. of California*, 93 Cal.App.3d 521, 522-523, and therefore have not been *independently* reviewed by the *Office of Administrative Law* like all other administrative agency regulations for: (a) necessity; (b) authority; (c) clarity; (d) consistency; (e) reference; or (f) no duplication within the meanings set forth in Cal. Gov. Code, § 11349(a)-(f), and consistancy with existing statutes, court decisions or other provisions of law. Cal. Gov. Code, § 11349 (d). Furthermore, UC Policy content can be unilaterally changed through the UC President's 'directives' which have profound and retroactive impact on the substantive rights of UC employees. See, e.g., *Ishimatsu*, supra, 266 Cal.App.2d at 859-860 where rights of librarian depended wholly on UC President's vague directives and impact on substantive rights and nature of 'hearing' afforded. What is more, Respondent is *self-insured* for medical malpractice, workers' compensation and other employment-related claims, *Ciba-Geigy Corp. v. Alza Corp.* (1992) 804 F.Supp. 614, 624; thus, the

Regarding Appellant's contention that the judicially-engrafted Exhaustion Doctrine selectively discriminates on the basis of viewpoint precluding UC whistleblower claims, the Court answered: "*This claim misstates the effect of the exhaustion requirement, because judicial review of the administrative determination is available via administrative mandamus.*" *Id.* at 25a. Not weighed, then, were the substantive and procedural burdens hoisted on UC whistleblowers forced to internally adjudicate their employer's wrongdoing in matters unrelated to the terms and conditions of employment,[6] its field of academic expertise or competence[7] - not to mention the public policy concerns of

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value of any fact-finding report conducted by UC administrators with internal incentives to dispose of any such claims in order to protect their internal reputations, budgets, salaries, and uninterrupted flow of equity bonuses, is questionable, at best. Still, in context of all of the above, reviewing courts presume Respondent's "employee" witnesses have, "no motivation to be untruthful" in their administrative proceedings, *Broussard, supra*, 131 Cal. App. 3d at 462 - 463.

[6] In an action for Writ of Administrative Mandamus, Cal. Code of Civ. Proc., § 1094.5, the UC employee is further burdened with the task of persuading the reviewing court to overturn Respondent's internal decision. In consideration, the reviewing court is limited to a review of the record to determine whether there is substantial evidence supporting the agency's decision. *Amluxen v. Regents of Univ. of California* (1975) 53 Cal.App.3d 27, 32-33; *Apte v. Regents v. Univ. of California* (1988) 198 Cal.App.3d 1084, 1091 (*Apte*); both citing *Ishimatsu, supra*, 266 Cal.App.2d at 864-865. Thus, the decision will be upheld so long as the record contains, "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Apte, supra*, 198 Cal.App.3d at 1091.

[7] The Lower Courts' holding is an unprecedented expansion of Respondent's scope of quasi-judicial authority far beyond its former scope of *assumed* competence over its own personnel disputes, *Ishimatsu, supra*, 266 Cal.App.2d at 863-864, into the realm of forcing Respondent's

handing an employer, a non-profit "public trust" corporation charged with responsibility for managing the internal and extra-mural affairs of ten campuses, five medical centers, three national nuclear weapons laboratories[8] and countless 'joint ventures' with for-profit industry a newly-minted, freely delegable license to *find facts, rerder decisions, remedy* and *negotiate away* its own crimes against the People.

4. A timely Petition for Rehearing was filed wherein Appellant's First Amendment and Equal Protection concerns were again raised. This time appellant cited a recent Exhaustion Doctrine case where the Court *did* weigh public policy and equal protection concerns and clearly respected the burdens hoisted on public employees if forced to negotiate the "procedural minefield" imposed by strict application of the Exhaustion Doctrine. *Schifando v. City of Los Angeles* (2003)

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internal procedures on *former* employees in matters directly resulting from its own violations of state and federal law. In support of this expansion, the Lower Court cited *Ishimatsu* and *Apte*. However, both of these cases involved Respondent's quasi-judicial authority over proceedings involving ***violations of UC policies, only.*** No violations of statutory law, constitutional rights or public policy concerns were alleged by the aggrieved UC employees. See, *Ishimatsu, supra*, 266 Cal. App.2d at 861, and *Apte, supra*, 198 Cal.App.3d at 1089-1090. Furthermore, *Ishimatsu* was decided before California defined UC non-academic employee's continuing interest in their employment as "property" subject to due process protection. *Mendoza v. Regents of Univ. of California* (1978) 78 Cal.App.3d 168, 175 - 177. *Apte* is also distinguishable because he *availed himself* of the quasi-judicial proceedings as applicable academic policies provided him with protective *academic* review, a hearing on the issue of fairness, and protection from *unreasonable, arbitrary or capricious conduct* from Respondent's administration as a non-tenured academic employee. *Apte, supra*, 198 Cal.App.3d at 1089 - 90 - protections notably absent from Respondent's *non*-academic policies and procedures.

[8] http://www.ucop.edu/services/employment.html.

31 Cal.4th 1074, 1088. In that case the California Supreme Court found, "troubling the possibility that exhausting City Charter procedures might deprive a victim of discrimination of a civil right created by the Legislature," *Id.* at 1083, and, thus, held that when an *external* administrative forum is available to hear discrimination claims under the *Fair Employment and Housing Act*, Cal. Gov. Code, § 12940 *et. seq*, the aggrieved need not exhaust *both* the internal and external administrative remedies. *Id.* at 1092.[9]

Appellant also cited the original whistleblower case, *In re Quarles* (1895) 158 U.S. 532 (*Quarles*), in an attempt to remind the court of its duty to protect employees who risk much in respect for their duty to "communicate to the executive officers any information" regarding violations of law. *Id.* at 535. Like Worley in *Quarles*, Appellant was being punished by the wrongdoers because one of Respondent's "side businesses" was reported,[10] repugnant to state and federal laws, as well as internal revenue code, *Id.* at 532. Like Worley, Appellant was simply asking the Court to apply statutory law which expressly afforded her a remedy for injuries resulting from reporting Respondent's wrongdoing, injuries which were being further exacerbated by being denied access to a court of law and subjecting her to a "constitutional black hole" where none need exist. Within 48 hours of filing the Petition for Rehearing the Court notified Appellant that it was extending the time for the Court to consider her Petition, but then denied a re-hearing on May 18, 2005. App. D, *infra*, at 47a.

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[9] *Schifando* was nevertheless distinguishable because there the employer was asserting jurisdiction over matters directly related to the terms and conditions of employment. *Id.*

[10] See, *Investigative Report I2003-2, Cal. State Auditor, Sept. 17, 2003, Chapter 5.*

REASONS FOR GRANTING THE PETITION

This Court should grant Appellant's Petition for Writ of Certiorari (Petition) because California courts are deciding important federal questions in a manner that collides with controlling decisions of this Court and in disregard of fundamental rights inviolably vested under the U.S. Constitution without defining any compelling or even legitimate State interests being served. In an era of whistleblower and *qui tam* actions, from *Enron* to the LAPD's *Rampart* scandal, citizens need clear guidelines of the 'safe way' to call attention to wrongdoing in a manner that appropriately balances the probable risk and urgency of the matter from the perspective of the *Quarles* citizen trying to comply with 'higher law' in good faith and reporting wrongdoing under urgent and upsetting circumstances; governmental interests in policing, detecting and correcting wrongdoing on behalf of its citizens; and those of government agencies serving in specific, state-defined capacities bound to enforce regulations that improve the efficiency of the services they perform on behalf of the public.

This Court should grant Appellant's Petition because it is clear that state courts need an 'awakening' similar to that provided federal courts in *Madey v. Duke* (Fed. Cir. 2002) 307 F.3d 1351, cert. Denied, 123 S. Ct. 2639 (2003) (*Madey*). The "*business of a university*" is no longer solely about providing "that atmosphere which is most conductive to *speculation*, *experimentation* and *creation*," *Bakke*, *supra*, 438 U.S. at 312, as cited by this Court in simpler times.[11]

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[11] The *business of a university* has received more attention from concerned government, academic and research circles since 1984 when the *The Patent and Trademark Law Amendments Act*, 35 U.S.C. 200-212, (the *Bayh-Dole Act)* was passed by Congress. Under *Bayh-Dole*, university-developed and government-subsidized inventions are permitted exclusively licensed to industry for commercial purposes leading to increased 'deals'

with for-profit entities and concerns about whose interests are being served within the ivory towers. E. Pre[illegible] and J. Washburn, *The Kept University*, Atlantic Monthly (March, 2000). Within the UC system, however, documented concerns about "the business" of a university and its *administrators* pre-dates *Bayh-Dole* by decades, along with the disproportionate *public* costs of such conflicts of interest. See, e.g., Robert van den Bosch, *The Pesticide Conspiracy* (Univ. of California Press, 1978). Prof. van den Bosch, a Professor of Entomology and Chairman of the Division of Biological Control at UC Berkeley, also a Guggenheim Fellow, consultant to the Ford Foundation, the U.S. Environmental Protection Agency, the United Nations, and several foreign nations, documented his "revulsion" within the UC system, *Id.* at 126, partially caused by UC administrators' partnerships with an agri-chemical company-funded organization wherein they traded the UC name and reputation for prestigious corporate board positions and other such 'perks,' making the use of pesticides appear legitimate and within the best interests of the public and despite the work of vested UC researchers proving to the contrary. *Id.* at 119 - 128. The list of the organization's founding members included the vice-president for agricultural sciences, the U.C. Davis chancellor emeritus and an agricultural-extension specialist as board members. *Id.* at 126 - 127. Their initial meeting minutes reflected their express agreement that, "*agriculture, agri-chemical industry and UC interests should develop an aggressive, positive, factual public relations and information program regarding agri-chemicals,*" *Id.* at 126. - a campaign that cost the state of California hundreds of millions of dollars in the 1970s, *Id.* at 154, and cost committed UC researchers their reputations, their scientific integrity, and their legitimate lines of research in the public interest because of UC administrators' intense pressure to abandon lines that did not have immediate commercial value or serve their personal interests. *Id.* at 61-62, 102, 107, 180, 199. Interestingly, in the same time frame, a California case arose involving a UC Davis vice chancellor's improper public release of a report prepared by three UC Davis veterinarians stating reasons for the death of 95 heifers and over 400 calves after being sprayed with the chemical toxaphene to prevent the spread of scabies. *Neary v. Regents of Univ. of California* (1986) 185 Cal.App.3d 1136. Neary tried to stop release of the publication because of the UC veterinarians' false claim that Neary engaged in deficient ranch

Respondent's interests in commerce, joint ventures and partnerships with industry are renowned, surpassing any other university system in the nation.[12] UC whistleblower cases may or may not be as "few" as patent infringement cases within Duke University. It nevertheless seems to be the same kind of "conceptual dilemma" that led the Lower Courts "astray", *Madey*, supra, 307 F.3d 1362, in their decision to

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management practices which led to the illness and death of many of his cattle rather than the spray of toxic chemicals. *Id.* at 1140. The UC veterinarians' false claims and the vice chancellor's improper release of the report over Neary's objections eventually led to a jury verdict for Neary in a libel action for $7 million *Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 273, 276 - 277. It is also interesting to note that in the latter *Neary* case, the California Supreme Court considered for the first time the issue of whether, *after a trial court judgment*, the parties should be able to reverse the jury verdict by stipulation. *Id.* at 275. Respondent persuaded a majority of the Court that public policy reasons supported their ability to buy a reversal. The considerations deemed "most significant" by the Court were, "*negative publicity. . . especially harmful to an institutional defendant,*" the "*lasting effect*" of "*[n]egative news reports*" and the "*considerable emotional distress*" during litigation - costs that are "*unrecoverable.*" *Id.* at 862. Justice Kennard wrote a sharp dissent against a "*regime where stipulated reversals are freely available on appeal.*" *Id.* at 869. Furthermore, "***public respect for the courts is eroded when this court decides that a party who has litigated and lost in the trial court can, by paying a sum of money sufficient to secure settlement conditioned on reversal, purchase the nullification of the adverse judgment.***" *Id.* at 867 (emphasis added). Clearly, more than public respect has been lost in California as a result of Respondent's administrators' unbridled business practices, lack of oversight and heavily-curtained windows.

[12] Respondent notes that its services and research interests reach far beyond its borders as it is, "actively involved in locations beyond its campuses, national laboratories, medical centers and neighboring communities — in places throughout California, around the world and online." *http://www.universityofcalifornia.edu/campuses/welcome.html.*

impose the Exhaustion Doctrine in an unprecedented manner which affords the wrongdoer license to burden the protected speech of UC whistleblowers under a rule of administration that necessarily presupposes an appropriately *competent forum* in the subject matter of the proceeding in the first place. Similar to the district court's unconsidered application of the *'experimental use'* exception in the *Madey* patent infringement case, courts can no longer presume that activity within the ivory tower is "*for the state*" or solely in support of research, academia or experimentation, thereby inoculating all forms of activity therein just because its publications and policies represent a nonprofit, education and research purpose, *Id.* at 1361, or because stem cell breakthroughs may be taking place in the next building. Like the reversing court's decision in *Madey*, a meaningful examination of the *nature* and *character* of the acts alleged is required to apply the appropriate principles of law rather than wooden application of rules of administration that fixate on the *status* of the wrongdoer as controlling on the substantive rights and process due the aggrieved. *Id.*

This Court should grant Appellant's Petition because "implicating a government official in criminal activity goes to the very core of matters of public concern." *Gentile v. State Bar of Nevada (1991) 501 U.S. 1030, 1036 (Gentile).* However, unlike the Nevada legislature in *Gentile*, the "safe harbors" provided whistleblowers by the California Legislature were not vague, but were nevertheless treated as such by the Lower Courts as a means to impose the Exhaustion Doctrine in an unprecedented manner[13] because UC employees are somehow perceived as *not the same* as other employees in the State of California.

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[13] See, supra, n 7 at p. 10.

We are told there are 155,000 UC employees[14] - employees who, despite the Lower Courts' treatment, are *no different* in their need for protection by their state in order to feel free to report their employer's wrongdoing and "side businesses" on an urgent basis and in compliance with 'higher law,' *Quarles*, *supra*, 158 U.S. at 532; nor in their need for assurance that, by virtue of accepting professional employment at a public university, they do not waive any statutory or constitutional safe harbors provided other classes of employees by operation of law.[15] There may be 155,000 UC employees, but this Court needs only *one* injured by the maze-like regulatory scheme imposed by the Lower Courts in disregard of public policy and in a manner affording some whistleblowers protection and the right to immediately access a court of law, but capriciously and arbitrarily denying the right to others. *Lindsey v. Normet* (1972) 405 U.S. 56, 77. Appellant respectfully requests that this Court grant this Petition in consideration of the following points of law.

I. THE LOWER COURTS' IMPOSITION OF THE EXHAUSTION DOCTRINE WITHOUT PRECEDENT OR JUSTIFICATION BURDENS FREE SPEECH IN MATTERS GOING TO THE CORE OF PUBLIC CONCERN

As also noted by Justice BRANDEIS decades ago, "[i]t is one of the happy incidents of the federal system that a single courageous State may, *if its citizens choose*, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 (emphasis added). Perhaps vesting Respondent and its administrators with

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[14] www.universityofcalifornia.edu/aboutuc/welcome.html.

[15] To the extent that is possible, they should be adequately noticed *in advance* by the employer so there is opportunity to decline any such job offer.

unchecked authority to manage the internal and extramural affairs of ten operating campuses, five medical centers, three national nuclear weapons laboratories,[16] countless research centers renowned for their relations with industry and for-profit ventures - along with the welfare of 155,000 *government* employees - at the same time affording a level of autonomy, governmental privileges and corporate functions that are unparalleled by any other public university system in the nation *based on a set of conditions that no longer exist*[17] is one such courageous experiment, but it is not one that was chosen by the people of the State of California.[18] What is

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[16] http://www.ucop.edu/services/employment.html.

[17] See, *In re Royer* (1899) 123 Cal. 614 (*Royer*) for California's last careful analysis of Respondent's intended governance structure, internal balance of power and system of "check" defined under the Organic Act of 1868 and article IX, 9 as referenced by this Court in *Hamilton*, *supra*, 293 U.S. at 255 - 256. The necessary preconditions to the UC system's envied and unparalleled degree of autonomy and public trust status included a prescribed balance of power between Respondent who was charged with responsibility for the general government and superintendence of the UC, *Royer, supra,* 123 Cal. at 617; the UC President who was deemed the executive head with authority to give general direction to the *practical* affairs of the several colleges, *Id.* at 617 - 618; and their respective faculties (through the Academic Senate), who were entrusted with the, "*immediate government and discipline of the several colleges*" to "consist of the president and the resident professors of the same.' *Id.* at 622. *Ishimatsu* and *Apte* illustrate that this prescribed system of governance has been wholly abandoned and business administrators now assume all three roles while bound by no such traditions or scope of expertise as the Academic Senate(s) resulting in inevitable tension between "academic" and "business" functions and the marginalization of the Academic Senate(s) by administrators. See, e.g., *Apte*, *supra*, 198 Cal.App.3d at 1091, and *Ishimatsu*, *supra*, 266 Cal.App.2d at 857.

[18] Without much analysis or careful definition of terms, Respondent's organization has blossomed before the eyes of the California Supreme

more, this experiment implies substantial public costs that are not confined to California's borders and implies competing state and federal interests that sorely need to be balanced by this Court.[19]

Court from, a "governmental institution" and "instrumentality of the state," that "is not clothed with the sovereignty of the state and is not the sovereign," *Royer*, *supra*, 123 Cal. at 624; to a university "so autonomous that, unlike other state agencies, it is subject to the laws applicable to private persons and universities," *San Francisco Labor Council v. Regents of Univ. of California* (1980) 26 Cal.3d 785, 789; to, contemporarily, "**a branch of the state itself.**" *Campbell v. Regents of Univ. of California*, *supra*, 35 Cal.4th at 321 (emphasis added). Unfortunately, there is no case that considers the separation of powers implications of Respondent's unbridled rise in power or whether the Legislature could have authority to engraft another branch of government under art. IX, 9, however passionate about public education at the time. This has led to the same muddying of terms in Federal Courts. See, e.g., *Unix System Labs v. Berkeley Software Design* (1993) 832 F.Supp. 790, 796 and *Ciba-Geigy Corp. v. Alza Corp.* (1992) 804 F.Supp 614, 622. California's troubles nevertheless appear to have begun with an opinion of the California Attorney General reading art. IX, 9 (a)'s standard corporate enabling language applicable to Respondent's internal governance powers in isolation from the preconditions for Respondent's authority as defined in the organic act - an analysis which led to the conclusion that Respondent constitutes, "a branch of the state government *equal and coordinate with the legislature, the judiciary and the executive.*" *Ishimatsu*, *supra*, 266 Cal.App.2d at 864 (emphasis added).

[19] It is also important to note that this Court's treatment of Respondent's policies in *Hamilton* going to the issue of the Court's *proper exercise of jurisdiction, only* (*Hamilton*, *supra*, 293 U.S. at 257 - 258), is regularly interpreted by California Courts to mean that this Court has forever graced Respondent's internal policies, "with a status equivalent to state statutes," *Regents of Univ. of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, regardless of the lack of substantive or procedural safeguards under the CAPA or subsequent "directives" from the UC president's office (UCOP) altering their legal import. See, *supra*, n 4 at p. 9.

A. Imposition of the Exhaustion Doctrine Without Precedent Renders California "Whistleblower" Law a Regulatory Maze.

It is well established that, "[b]ecause First Amendment Freedoms need breathing space to survive, government may regulate in that area only with narrow specificity." *Keyishian*, supra, 385 U.S. at 604; citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433. In *Keyishian*, this Court scrutinized a "regulatory maze" created by the New York Legislature in its directive to the Univ. of the State of New York Board of Regents that it promulgate regulations and procedures for the disqualification of teachers who were members of a 'subversive' organization. *Id.* at 595-596. In invalidating the legislative scheme because of its vague language and cross references, this Court noted the legitimacy of the state-defined interest in protecting its education system from subversion, but concluded that its purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Id.* at 602.

Here, the speech being regulated within a public university setting does not *at first glance* arouse Academic Freedom concerns,[20] more immediately involving the

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[20] It is clear, however, that Academic Freedom is very much at the heart of this case, as well. To the extent California courts continue to permit Respondent's administrators to veil their activities by way of forcing UC whistleblowers to internally grieve their violations of law or lose their chance for a hearing on the merits, the coercive environment against researchers who don't 'fall in line' with business administrator's personal interests, corporate perks and "side businesses" at the expense of their public interest research, as carefully detailed by Prof. van den Bosch and other contemporary UC researchers, will also continue unabated. See, *supra*, n. 10, at p. 14-16; *see also*, Sharon Walsh, *Berkeley Denied Tenure to Ecologist Who Criticized University's Ties to the Biotechnology Industry*, The Chronicle of Higher Education, v. 50 (Jan. 9, 2004), and

wrongdoing of public trust officers in their business functions, but in any case going directly to the core of public concern and weighing heavily in any First Amendment analysis. *Gentile*, *supra*, 501 U.S. at 1036. Moreover, the controlling state-wide legislation in this case, Cal. Gov. Code § 12653 and Cal. Labor Code § 1102.5, were not facially vague and filled with cross-references. It was the employer, however, the "focus" of the legislation, that persuaded the Lower Courts that *unwritten* cross references belonged there, creating a regulatory maze out of whole cloth by overlaying its vague Policy on unwitting *former* employees in a field already fully occupied by the Legislature - and rightfully so given that *the field* concerns its crimes against the people.

Additionally, in this case, the essential premise for application of the Exhaustion Doctrine, as was present in *Patsy*, a §1983 case also arising within a public university is wholly absent. *Patsy*, *supra*, 457 U.S. at 496. Although application of the Exhaustion Doctrine in § 1983 cases was categorically rejected in *Patsy* (save a narrow exception not applicable here) Justice POWELL noted in his dissent the circumstances under which the application of a "flexible" Exhaustion Doctrine would make sense in an employment setting where constitutional rights are at stake, including where administrative proceedings are pending, *Id.*, at 534, and where *adequate* state administrative remedies are available, *Id.*, at 536 (emphasis added). Patsy, herself, sought an internal remedy that she believed would fully compensate for her injuries as a university employee. Specifically, she asked the District Court to,

> "[r]equire Defendants to remedy the discrimination practiced upon Plaintiff by promoting her to the next available position

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Goldie Blumenstyk, *Reviewers Give Thumbs Down to Corporate Deal at Berkeley*, The Chronicle of Higher Education v. 50 (Aug. 6, 2004).

> consistent with those previously applied for and for which she is qualified *or in the alternative*, to require the Defendants to pay to the Plaintiff the sum of $500,000 as actual and exemplary damages." *Patsy, supra*, 457 U.S. at 536, n 2. (emphasis added)

Application of the Exhaustion Doctrine would not make sense, then, even in Justice POWELL's view, when the employee has already been terminated and hence there is no employment relationship, there are no (or should be no) pending internal proceedings because *the remedy* requires findings on the employer's own violations of state and federal law which are, by definition, outside the terms and conditions of employment, and where the public employer's *internal* administrative remedy is, categorically, inadequate.[21]

B. Imposition of the Exhaustion Doctrine On UC Whistleblowers Without Precedent Constitutes Content-Based Viewpoint Discrimination Subject to Strict Scrutiny.

This Court has also long held:

> *Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the*

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[21] Although 'inadequate administrative remedy' is also an exception to the Exhaustion Doctrine under California law and therefore might have been argued in the lower courts ("a remedy is not adequate if it does not square with the requirements of due process," *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 168) the most seasoned administrative lawyer, much less a *Quarles* citizen, could not have anticipated that the scope of Respondent's quasi-judicial authority could be unilaterally expanded by the Lower Courts from that vested in the Academic Senate by the legislature under the organic act and art. IX, 9, see, *Royer, supra*, 123 Cal. at 622; to business administrators over personnel dispute, *Ishimatsu, supra*, 266 Cal.App.2d 863-864; and then again to business administrators over disputes that arose from the employer's own crimes against the people.

> *use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . **[G]overnment must afford all points of view an opportunity to be heard.**" Police Dept. of the City of Chicago v. Mosley* (1972) 408 U.S. 92, 96.

Appellant has now spent over ten years of her life trying to be formally *heard*. First, internally at UCSF, App. A. *infra*, at 2a; and, when no interest was shown in *correcting* the illegalities but only interest in furthering the illegalities, the FBI. *Id.* Under the subject statutes, Cal. Gov. Code, § 12653 and Cal. Labor Code, § 1102.5, the California Legislature provided a 'forum' for UC whistleblowers - a court of law - to assure that they would be protected if injured as a result of engaging in protected "expressive conduct," and including a definition of the procedural prerequisites for accessing this government-provided forum. See App. E, *infra*, at 64a - 65a, and App. F, *infra*, at 72a. The Lower Courts, however, did not seem to want to hear what Appellant has been trying to report, instead positing that, because of Respondent's *status* under the law, Appellant *should have known* that all UC employees are bound to follow a *different* set of procedures to access a court of law and therefore shouldn't have been suprised when her forum was pulled out from under her. See, App. B, *infra*, at 42a. The irony of this proclamation is apparent when one considers the intended function of Respondent's "constitutional agency" status vested under art. IX, § 9, subdivision (a) for reasons specifically articulated under subdivision (f)[22] that are identical to those

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[22] "*The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs. . .*" Cal. Const., art. IX, § 9 (f).

articulated by this Court in *Keyishian*;[23] - in short, for purposes of academic freedom and protection from political influence and corruption. The Lower Courts have instead allowed Respondent's administrators to turn the UC system's public trust status on its head, using Respondent's *Fiat Lux* corporate seal as their own personal firewalls to do business *in the dark, as they please,* to the detriment of not only the public, but also academics who take seriously the public's interest in their chosen lines of research.[24]

C. Imposing the Exhaustion Doctrine Contravenes the Express Purpose of the Statutes - UC Employee's Freedom to Whistleblow - Without Serving a Compelling Interest in the Efficiency of the Public Service Respondent Performs - Education of Our Young and Research for the Benefit of the Public.

There can be no question that the notion that public employment may be conditioned on surrender of constitutional rights was long ago rejected by this Court. *Keyishian, supra,* 385 U.S. at 605. In rationalizing their imposition of the Exhaustion Doctrine, however, the courts below seemed to presume precisely the contrary. In their view, *"[e]mployees of a constitutionally created entity are not the same. . ."* App B, *infra*, at 42a. Perhaps the courts simply meant to remind that a government employer may apply workplace regulations promoting its efficiency, which

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[23] *"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Keyishian, supra,* 385 U.S. at p. 603.

[24] See, *supra*, n. 12 at pp. 13.-15

may impact employees' speech in a manner that might violate the First Amendment outside the employer-employee relationship, *Pickering v. Board of Education of Township High School District 205* (1968) 391 U.S. 563, 568. But, if so, the specific interests being served were then never clearly defined or balanced so UC whistleblowers might henceforth understand why their right to speak out on matters of public concern is subjected to substantial filtering. What is more, although judicial convenience for our overburdened courts is a legitimate state interest, it is not one that has yet to be found in any court's *Pickering* balance. Interests that should have been balanced include: (1) the property and liberty interests at stake, including the protected speech of a government whistleblower and her right to access a court to remedy injuries resulting from reporting her employer's violations of law; (2) the weight of her allegations; (3) the State's express interest in holding employers accountable for their violations of law; (4) state and federal governments' interests in assuring that its contractors are trustworthy stewards of government funds who appropriately report *alternative* sources of income; (5) public policy concerns that the unprecedented expansion of the Exhaustion Doctrine will lead to whistleblowers' reluctance and refusal to report illegality in fear of more concerted and uncontrollable retaliation for lack of external protection, unchecked injury, buried allegations, delay and dissipation of evidence of crimes against the people and thus interference with the State's duty to *detect* and *correct* violations of law which would otherwise lead to the *improvement* of the legal, business and ethical climate of Respondent's administration and therefore add to the efficiency of the academic and research services it performs; on the one hand, as weighed against (1) a presumed helpful factfinding report, on the other.[25] California surely deserves

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[25] See, supra, n. 5 at pp. 8-9.

a more careful balance by its courts in view of the compelling interests at stake that have been summarily disposed of with only one backward glance by the Lower Courts.[26]

II. THE DECISION BELOW HOISTS SUBSTANTIAL PROCEDURAL AND ECONOMIC BURDENS ON UC WHISTLEBLOWERS CONFLICTING WITH THIS COURT'S EQUAL PROTECTION JURISPRUDENCE.

This Court has long held that a litigant's right to use a state's adjudicatory procedures is a species of property that, if denied where others similarly-situated are afforded a hearing on the merits before their property interests are

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[26] See, *Palmer v. Regents of University of California* (2003) 107 Cal.App. 4th 899 (*Palmer*) for another example of the confused state of the law surrounding UC whistleblowers, including one lone but noteworthy dissent from the Second District Appellate Court's Judge Johnson. *Id.* at 910 - 920. Palmer was a laboratory technologist terminated after 21 years of employment at Respondent's Los Angeles campus (UCLA) during which time she alleged having repeatedly reported laboratory abuses at UCLA, including its failure, "*to comply with state regulations regarding reviewing lab results and failure to comply in signing off those results [and] that data from the lab was being falsified.*" *Id.*, at 902. She alleged she, "*was wrongfully terminated and not rehired because of her whistleblowing activities.*" Palmer also initially sued under Cal. Labor Code, § 1102.5 but the trial court concluded that reports of violations *to the employer itself* are not protected under § 1102.5 and, in any event, Respondent presented evidence of a proper basis for Palmer's termination. *Id.* The Appellate Court reversed in an unpublished opinion. *Palmer v. Regents of the Univ. of California* (Mar. 5, 2001, B138553), holding that Palmer had stated a "classic" common law cause of action for discharge in violation of public policy, *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, and that triable issues of fact existed as to the reasons for Palmer's discharge. *Id.* Respondent thereafter moved for summary judgment, again on the ground Palmer was required to exhaust its internal administrative remedies, which was granted by the trial court. *Id.* at 904. The Appellate Court affirmed, Palmer's claims were barred and Respondent recovered its costs from Palmer on appeal. *Id.* at 910.

extinguished, is a violation of the Due Process, as well as the Equal Protection Clause of the U.S. Constitution when the State's interest in refusing to do so is insubstantial. *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422 (*Logan*). This Court has also held that economically burdening a litigant's right to access a court of law in a manner different than others similarly situated is also a denial of equal protection of the laws. *Lindsey v. Normet* (1972) 405 U.S. 56 (*Lindsey*).

1. In *Logan*, this Court considered whether a State may terminate a complainant's cause of action - also on *procedural* grounds - where a state official failed to comply with statutorily-mandated procedures for reasons beyond the complainant's control. *Logan*, *supra*, 455 U.S. at 427. Though the analysis was primarily on Due Process grounds, in a separate concurring opinion, Justice BLACKMUN, Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR concluded that, under the "rational-basis" standard, the Illinois statute, ***as interpreted and applied by the Illinois Supreme Court to establish two categories*** - those processed within the prescribed filing period and otherwise identical claims not processed within the prescribed time and thus terminated without a hearing - deprived Logan of his right to equal protection of the laws. *Id.* at 438-442 (emphasis added). In a separate concurring opinion, Justice POWELL and Justice REHNQUIST also concluded that the challenged classification failed to be rationally related to a state interest that would justify it, and thus violated appellant's right to equal protection of the laws. *Id.* at 443–444.

Like *Logan*, Appellant's interest in continuing employment, statutory causes of action and right to access a court of law were valuable property interests. Like *Logan*, after Appellant's employment was terminated she tried to follow jurisdictional prerequisites in good faith, factoring that (a) the terms of the subject statutes are defined to include the

UC as an employer;[27] (b) the terms of Respondent's Policy are defined to apply to "[a]ny *UC employee,*" Appellant was no longer a UC employee, and thus it did not apply to her (see App. G, *infra*, at 77a); and (c) none of Respondent's directives, including the Zuzofsky Letter, put Appellant on notice that any additional jurisdictional prerequisites were required or her property interests could be extinguished if she declined to *go back* to the employer to internally grieve its own violations of state and federal law. Under the circumstances, there was nothing else Appellant could reasonably be expected to do to comply with statutory law in good faith.

Like *Logan*, the classification here arose not by legislative mandate, but from the courts' application of a judicially-created rule of procedure into a new field[28] without concern for the heavy private and public costs of doing so. Like *Logan*, there is no substantial state interest justifying the costs of imposing the Exhaustion Doctrine on UC whistleblowers in a manner denying them, "the opportunity to be heard." *Id.* at 430; citing *Bodie v. Connecticut* (1971) 401 U.S. 371, 380 (brackets omitted). On the other hand, compelling interests in affording UC whistleblowers the right to be heard have already been delineated herein, the serious nature of which necessarily excludes Respondent as the candidate agency that should be authorized to unilaterally control *the process due* the aggrieved in any such hearing on the merits. *Id.* at 433-434.

2. In *Lindsey, economic* burdens associated with state classifications were challenged under Oregon's Forcible Entry and Wrongful Detainer (FED) Statute. *Lindsey*, *supra*, 405 U.S. at 71. Again, since no fundamental rights were at stake

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[27] *See*, App. E, *infra*, at 64a and App. F, *infra*, at 72a.

[28] See, *supra*, n 7 at p. 11.

this Court applied a 'rational basis' test and still held one of the subject classifications invalid on equal protection grounds because it required FED *appellants* to post a double-bond to appeal a decision, *Id.* at 74, a classification justified on the ground it was intended to prevent "frivolous appeals for the purpose of delay." *Id.* at 76. In *Lindsey*, the double-bond requirement was deemed a *heavy burden* by this Court, *Id.* at 77 - to the poor and non-indigent, alike. *Id.* at 79. Though a heavy burden, it is again no stretch to suggest that any UC whistleblower who has already lost too much as a result of reporting Respondent's ongoing violations of law to responsible government authorities subsequently ostracized, demoted and terminated would gladly pay a double bond if it would afford her a hearing on the merits and help California Courts overcome their conclusive presumption that all activity within the UC system directly results in cancer cures, gold dust and *Lux*, and, thus, UC whistleblowers' claims are likely frivolous and in need of a different and far more time-consuming and costly set of procedures because, after it all, a helpful fact finding report may result.[29]

III. THIS COURT HAS ALREADY DEFINED THE OUTER LIMIT OF RESPONDENT'S AUTHORITY AND COMPETENCE UNDER THE LAW.

In *Bakke*, this Court considered another one of Respondent's internal policies promulgated outside its arena of academic expertise, without state authority or carefully-drawn procedures. *Bakke, supra*, 438 U.S. at 265. Despite the compelling state interest at issue and intent to remedy the effects of past racial discrimination, Respondent's internally-promulgated procedures were rightfully rejected by this Court. Specifically,

> ***Petitioner does not purport to have made, and is in no position to make, such findings. Its broad***

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[29] See, *supra*, n. 5 at pp. 8-9.

> ***mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."*** *Id.* at 309 (emphasis added).

Here, Respondent again attempts to weave its policies into a new field, this time a field fully occupied. Furthermore, in sharp contrast to *Bakke*, here we can presume no such beneficent intent, nor any legitimate state interest justifying Respondents drive to impose its policy scheme in a manner burdening UC whistleblower's protected speech. Respondent has nevertheless persuaded the Lower Courts that there are *administrative* benefits to doing so because UC employees are *not the same,* App. B, *infra* at 42a; are free to whistleblow elsewhere, App. A, *infra* at 26a; and are always free to file a mandamus action to set aside any adverse internal decision, *Id.*, and thus, with extraordinary persistence and inexhaustible resources, they might one day have their day in court. Under this internally-concocted regulatory maze, UC Whistleblowers are henceforth curtained off from the rest of the state by over-sized and threadbare banners reading, *Fiat Lux*.

IV. CONCLUSION

This court should grant Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

SUPREME COURT OF CALIFORNIA

S113275

March 7, 2005, Filed

JANET CAMPBELL,
Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, San Francisco
Defendant and Respondent.

On Appeal From
Superior Court of the City and County of San Francisco
No. 312736
David A. Garcia, Judge
Court of Appeal, First District, Division One
No. A097560

Chin, J., expressing the unanimous view of the court.

OPINION

In this action, we address whether an employee of the Regents of the University of California (the Regents) must exhaust university internal administrative remedies before

filing suit in superior court for retaliatory termination under either Government Code section 12653, subdivision (c), or Labor Code section 1102.5, sometimes called the "whistleblower" statutes. We conclude the exhaustion rule requires university employees to exhaust university administrative remedies before proceeding to suit. We therefore affirm the judgment of the Court of Appeal.

I. FACTUAL BACKGROUND

Appellant Janet Campbell worked for the Regents as a senior architect in the Architectural Design and Engineering Unit of the Facilities Management Department (FMD) at the University of California, San Francisco (UCSF). The Regents, a state government entity, administer the University of California, including UCSF. (See *California Medical Assn. v. Regents of University of California* (2000) 79 Cal.App.4th 542, 544, fn. 1 [94 Cal. Rptr. 2d 194].) Campbell's job duties included reviewing architectural plans and specifications for all campus construction projects costing less than $250,000, to ensure that the projects complied with competitive bidding laws. Campbell claims that in 1991, her supervisor at the FMD, acting on the Regents' behalf, directed her to prepare or help prepare bid documents that limited competition by using restrictive specifications. Campbell protested to the Regents on several occasions that using these documents to limit the bidding violated state competitive bidding laws. (See Pub. Contract Code, § 3400 [prohibiting state agencies from limiting contract bidding "to any one specific concern"].) She later reported the alleged violations to the Federal Bureau of Investigation (FBI).

In 1997, the FBI questioned UCSF officials about the alleged violations. The Regents then changed Campbell's job duties, assigning her to what she perceived to be menial, less

challenging projects. Campbell soon went on extended disability leave. Shortly after she returned to work, in January 1999, she was discharged. The Regents blamed her discharge on downsizing. Campbell claimed that less senior and less qualified coworkers were retained, however.

On March 4, 1999, Campbell, through her attorney, filed an internal complaint against UCSF and her supervisors. The complaint, filed under the grievance procedures set forth in UCSF's Personnel Policies for Staff Members (PPSM), alleged, among other things, that Campbell was discharged in retaliation for being a whistleblower.

On April 23, 1999, a UCSF staff member responded to the complaint in a letter to Campbell's attorney (the letter). The letter stated that the PPSM's complaint resolution process excluded allegations of retaliation for whistleblowing. The letter observed that such complaints were properly filed under UCSF's Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities (Policy and Procedures). The letter also stated, "Alleged violations of state and federal laws will be excluded from the [PPSM's] complaint resolution process." A copy of the applicable Policy and Procedures was enclosed with the letter. Campbell did not refile her complaint under the Policy and Procedures, as the letter directed.

Section IX (A) of the Policy and Procedures sent to Campbell states that "Any UC employee . . . may file a written complaint against a University employee alleging threatened or actual interference or retaliation resulting from the reporting of improper activities. . . . Retaliation is defined as the use of official authority or influence by a UC employee for the purpose of interfering with the right of a person to file a report as described in Section V above, or the right to file

such a report with the University Auditor or with the Auditor General of the State of California, or with other public officials designated to receive reports of improper activity. Use of 'official authority to influence' includes promising to confer, or conferring, any benefit; effecting or threatening to effect any reprisal; or taking, or directing others to take, or recommending, processing or approving any personnel action, including but not limited to appointment, promotion, transfer assignment, performance evaluation, suspension, or other disciplinary action."

The balance of section IX (A) contains provisions governing the complaint's contents. Immediately following that section is a paragraph titled, "Use of Existing Mechanisms." This paragraph states in pertinent part: "A complaint of retaliation/interference must be filed under existing University grievance or complaint resolution procedures ... if acceptable under those procedures. If the complaint is not within the scope of any complaint resolution procedure available to the complainant under the appeals mechanism described in the previous paragraph, or if the complainant is an applicant for employment or does not have a complaint resolution procedure available for some other reason, the complaint may be filed under this policy."

The letter therefore informed Campbell that the typical personnel manual grievance procedure did not apply to her grievance because she alleged state law violations. It also told her that she was required to file her grievance under the Policy and Procedures.

On June 7, 2000, Campbell filed a whistleblower complaint against the Regents in San Francisco Superior Court, seeking damages for retaliatory termination under Government Code section 12653 and Labor Code section

1102.5. She alleged that she had either exhausted all administrative remedies or was not required to exhaust them. The Regents demurred to the complaint on the ground that Campbell's refusal to file a grievance under the Policy and Procedures, as the letter directed, amounted to a failure to exhaust administrative remedies. The trial court sustained the demurrer. It granted Campbell leave to amend her complaint to allege either that she had fulfilled the exhaustion requirement, or that an exception to the requirement excused her from its application.

Campbell's first amended complaint alleged that she had filed an internal grievance complaint under the PPSM; that Government Code section 12653 and Labor Code section 1102.5 did not require her to exhaust UCSF's administrative remedies; and that the letter informed her that the PPSM excluded her whistleblowing allegations. She also claimed that the letter did not advise her that if she failed initially to pursue the proper administrative remedies for the whistleblowing claim, she would be precluded from taking legal action. The Regents again demurred to the amended complaint on the ground that Campbell failed to exhaust her administrative remedies.

The trial court sustained the Regents' demurrer to the first amended complaint. It gave Campbell leave to amend in order to plead that the futility doctrine excused her failure to exhaust, and that the Regents did not notify her of the relevant grievance procedures.

Campbell filed a second amended complaint, alleging that the principles of estoppel excused her from complying with exhaustion requirements because the Regents had failed to inform her of "the necessity to file a grievance under the whistle-blowing policy." The Regents demurred to that

complaint on the grounds that Campbell failed to allege that exhaustion would have been futile, and that she was properly advised of the applicable grievance procedures. The trial court sustained the Regents' demurrer to the second amended complaint without leave to amend and entered judgment in the Regents' favor.

Campbell appealed. The Court of Appeal affirmed the trial court's dismissal for failure to exhaust administrative remedies. We granted Campbell's petition for review.

II. DISCUSSION

A. *Procedural Background*

When reviewing a judgment dismissing a complaint after a successful demurrer, we assume the complaint's properly pleaded or implied factual allegations are true, and we give the complaint a reasonable interpretation, reading it in context. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [6 Cal. Rptr. 3d 457, 79 P.3d 569] (*Schifando*).) We also consider judicially noticeable matters. (*Ibid.*) If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. (*Ibid.*) If we determine otherwise, then we conclude it did not. (*Ibid.*) The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)

B. *The Regents' Constitutional Authority*

Because the present action involves the rights of a UCSF employee, we should note the Regents' constitutional status. The California Constitution establishes the Regents as a "public trust . . . with full powers of organization and

government." (Cal. Const., art. IX, § 9, subd. (a).) We have observed that "Article IX, section 9, grants the [R]egents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the [R]egents. This contrasts with the comprehensive power of regulation the Legislature possesses over other state agencies." (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788 [163 Cal. Rptr. 460, 608 P.2d 277] (*Labor Council*) [the Regents are not bound by Education Code section 92611 when setting wage levels].) This grant of constitutional power to the University includes the grant of quasi-judicial powers, a view that is generally accepted in our jurisprudence. (*Ishimatsu v. Regents of University of California* (1968) 266 Cal. App. 2d 854, 864 [72 Cal. Rptr. 756]; see also *Apte v. Regents of University of California* (1988) 198 Cal. App. 3d 1084, 1091 [244 Cal. Rptr. 312].)

The Regents may also exercise quasi-legislative powers, subject to legislative regulation. Indeed, "policies established by the Regents as matters of internal regulation may enjoy a status equivalent to that of state statutes." (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal. App. 3d 130, 135 [143 Cal. Rptr. 276], citing *Hamilton v. Regents* (1934) 293 U.S. 245 [55 S. Ct. 197, 79 L. Ed. 343].) The authority granted the Regents includes "full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowment of the University and the security of its funds." (*Goldberg v. Regents of University of California* (1967) 248 Cal. App. 2d 867, 874 [57 Cal. Rptr. 463].) Thus, "[t]he Regents have been characterized as 'a branch of the state itself' [citation] or 'a statewide administrative agency' [citation]" (*Regents of University of California v. City of Santa Monica, supra,* 77 Cal. App. 3d

at p. 135), and "[i]t is apparent that the Regents as a constitutionally created arm of the state have virtual autonomy in self-governance" (*ibid.*). Therefore, "[t]he Regents have the general rule-making or policy-making power in regard to the University [citation], and are (with exceptions not material here) fully empowered with respect to the organization and government of the University." (*Goldberg*, *supra*, 248 Cal. App. 2d at p. 874.) The Regents may create a policy for handling whistleblower claims under their power to organize and govern the University. Such a policy is treated as a statute in order to determine whether the exhaustion doctrine applies.

The Regents are not entirely autonomous. The Legislature may regulate the Regents' actions in three areas: (1) the Regents cannot compel appropriations for university salaries, because the Legislature is vested with the power of appropriation; (2) statutes that express the state's general police power, such as workers' compensation laws, apply to the Regents; and, (3) when legislation regulating public agency activity addresses matters of statewide concern not involving internal university affairs, the legislation may be made applicable to the Regents. (*Labor Council, supra*, 26 Cal.3d at p. 789.)

C. *The Rule of Exhaustion of Administrative Remedies*

As the Court of Appeal observed, the rule of exhaustion of administrative remedies is well established in California jurisprudence, and should apply to Campbell's action. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 [109 P.2d 942] (*Abelleira*).) The rule "is not a matter of judicial discretion, but is a fundamental rule

of procedure . . . binding upon all courts." (*Id.* at p. 293.) We have emphasized that, "Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation]." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70 [99 Cal. Rptr. 2d 316, 5 P.3d 874].) "The gist of *Westlake, Rojo,* and *Moreno*[1] is a respect for internal grievance procedures and the exhaustion requirement where the Legislature has not specifically mandated its own administrative review process . . . ." (*Schifando, supra,* 31 Cal.4th at p. 1092.) The exhaustion rule extends to employees seeking judicial review of an employer's administrative findings. (*Johnson v. City of Loma Linda, supra,* 24 Cal.4th at p. 70.)

The rule has important benefits: (1) it serves the salutary function of mitigating damages; (2) it recognizes the quasi-judicial tribunal's expertise; and (3) it promotes judicial economy by unearthing the relevant evidence and by providing a record should there be a review of the case. (*Westlake, supra,* 17 Cal.3d at p. 476.)

As the Court of Appeal noted, the administrative remedies exhaustion rule has several exceptions, including, but not limited to, those Campbell raises: (1) when the administrative agency cannot provide an adequate remedy, and (2) when the subject of controversy lies outside the agency's jurisdiction. (*Edgren v. Regents of University of California* (1984) 158 Cal. App. 3d 515, 520-521 [205 Cal. Rptr. 6] (*Edgren*).) These exceptions remain flexible and are by no means limited

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[1] *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465 (*Westlake*); *Rojo v. Kliger* (1990) 52 Cal.3d 65; *Moreno v. Cairns* (1942) 20 Cal.2d 531.

to those discussed here. (*Ogo Associates v. City of Torrance* (1974) 37 Cal. App. 3d 830, 834 [112 Cal. Rptr. 761].)

D. *Campbell's Contentions*

1. General principles

Campbell initially asserts that the exhaustion rule does not apply here because the Regents provide inadequate administrative remedies and because her remedies lie outside the Regents' jurisdiction. She also claims that two anti-retaliation statutes the Legislature has enacted have superseded the exhaustion rule. As to the latter assertion, Campbell points to no specific provision in either statute. Rather, she asks this court to infer an exemption from the Legislature's statutory language allegedly authorizing direct access to the courts, in this and arguably related contexts. We address her claims separately.[2]

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[2] The Regents initially assert that Campbell waived her contention that her statutory retaliation claim is not subject to the exhaustion requirement because, although she raised the contention in her first amended complaint, she did not appeal the trial court's ruling sustaining the Regents' demurrer to that complaint with leave to amend. Instead, as discussed above, she filed a second amended complaint alleging she was excused from the exhaustion requirement, arguably a separate contention. The Court of Appeal did not address the waiver question, and we decline to do so here because Campbell's failure to exhaust administrative remedies presents a jurisdictional question related to her statutory claims, and we may review it at any point in the proceedings. (See *Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 592 [133 Cal. Rptr. 2d 735].)

2. Alleged inadequate remedy

Campbell initially asserts that she should have direct access to the courts because she seeks not only reinstatement and back wages, but also money damages. Campbell does not as a general matter dispute the adequacy of the Regent's remedial procedures. Rather, she claims the exhaustion rule should not apply to her because, "The administrative remedy will always be inadequate compared to the damages remedy made expressly available to an aggrieved employee by the Legislature under either Government Code section 12653(c) or Labor Code section 1102.5." Not so. The Regents' Policy and Procedures allow the Regents to provide the complainant with "any appropriate relief" and to impose any sanctions on the offending employees "in accordance with existing disciplinary policies or contract provisions."

In addition, even though Campbell's complaint seeks money damages in addition to reinstatement, our cases hold that the "policy considerations which support the imposition of a general exhaustion requirement remain compelling . . . ." (*Westlake, supra,* 17 Cal.3d at p. 476.) The logic holds even when no internal damage remedy is available, or a plaintiff seeks only money damages, so that resort to the courts is inevitable. As *Edgren* explains, courts have found the rule inapplicable only when the agency lacks authority to hear the complaint, not when the administrative procedures arguably limit the remedy the agency may award. (*Edgren, supra,* 158 Cal. App. 3d at p. 521; see also *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342-343 [124 Cal. Rptr. 513, 540 P.2d 609] [exhaustion rule does not apply when resolution of controversy falls outside scope of grievance procedures].) We believe that the "administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by

providing a record which the court may review." (*Westlake, supra,* 17 Cal.3d at p. 476.)

We also disagree that Campbell is exempt because the Regents lack jurisdiction. *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211 [188 Cal. Rptr. 115, 655 P.2d 317] provides an example of the exception an agency's lack of jurisdiction creates. In *Tiernan,* a temporary academic employee's term was not renewed. In her grievance she alleged that the law required her employer to adopt regulations governing notice of nonreappointment. The court found that the plaintiff's claim fell within the jurisdictional exception because it required the grievance committee to determine whether the university had to adopt regulations or interpret established regulations. In such a case, the grievance committee could deny a claim on purely procedural grounds. (*Id.* at p. 218.) By contrast, Campbell's action does not require the Regents' internal review board to decide the legality of current employer policies before considering the legality of the employer's actions.

Abelleira, supra, 17 Cal.2d 280, is also instructive. In *Abelleira,* a group of unemployed San Francisco dock workers petitioned for a writ of prohibition to restrain the Court of Appeal from enforcing a writ of mandate that it had issued against the California Employment Commission and in favor of their employer. The Court of Appeal determined that the commission acted beyond its statutory powers in requiring the workers to first satisfy the commission's administrative procedures. Thus, the commission had no jurisdiction to determine whether the dock workers were entitled to unemployment benefits. (*Id.* at p. 285.) In reversing the Court of Appeal judgment, we held that the commission did have jurisdiction to make this determination, and that the dock workers correctly sought administrative review before filing

their claim for benefits. (*Id.* at p. 291.) In so doing, we observed that the Unemployment Insurance Act provided for an administrative procedure. (*Ibid.*) The claim therefore fell under the exhaustion of administrative remedies rule. (*Id.* at p. 292.)

The present action involves a policy the Regents established to handle complaints of retaliatory dismissal for whistleblowing in an orderly manner. Because we may treat such a policy as equivalent to a statute in this action, and because that policy required Campbell to resort initially to internal grievance practices and procedures, Campbell had an administrative remedy within the meaning of *Abelleira* and its progeny.

3. Construction of Government Code section 12653 subdivision (c), and Labor Code section 1102.5

Campbell next contends that neither Government Code section 12653, subdivision (c), nor Labor Code section 1102.5 requires her to exhaust her administrative remedies, and that the Legislature therefore intended to abrogate the exhaustion requirement for actions such as hers. Because Campbell's argument requires us to construe two statutes, "we must ' "ascertain the intent of the lawmakers so as to effectuate the purpose of [each] law." '[Citations.] We begin by examining the language of [each] statute [separately], giving the words their ordinary meaning. [Citation.]' 'The words, however, must be read in context, considering the nature and purpose of the statutory enactment[s].' [Citation.] In this regard, sentences are not to be viewed in isolation but in light of the statutory scheme. [Citation.]" (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777 [63 Cal. Rptr. 2d 859, 937 P.2d 290] (*Torres*).)

a. Government Code section 12653, subdivision (c)

Government Code section 12653[3] is part of the False Claims Act (Gov. Code, §§ 12650-12656) (the Act). The Act protects public funds by authorizing employee informants who discover fraudulent claims made against state and local governmental entities to file qui tam suits on behalf of those entities. (E.g ., *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1672, fn. 2 [1 Cal. Rptr. 3d 312] [defining qui tam as part of a Latin phrase meaning one "who brings the action for the king as well as for himself"].) Qui tam plaintiffs sue as informers under a statute on behalf of themselves and the State of California. Qui tam plaintiffs may recover damages and penalties on behalf of public entities for themselves and the entities. (*Id.* at p. 1677.)

Section 12653 addresses employer interference with employee disclosures of false claims. Section 12653, subdivision (b), provides in pertinent part that no employer may discharge an employee because that employee has acted lawfully in disclosing false claims to law enforcement agencies. Section 12653, subdivision (c), states that an employer who violates subdivision (b) shall be liable to pay all the employee's costs and damages, including litigation costs and attorney fees. The last sentence of subdivision (c) provides, "An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision." Campbell contends that by operation of the rules of statutory construction, this sentence relieved her of any requirement to exhaust administrative remedies. Her

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[3] Subsequent statutory references are to the Government Code unless otherwise specified.

contention fails, however, because it ignores the sentence's context.

As the Court of Appeal observed, Campbell presents no direct authority supporting her position. Instead, she compares section 12653, subdivision (c), with sections 12652, subdivision (d)(4), and 8547.10, in order to argue that the Legislature intended to abrogate the exhaustion requirement in her action. To analyze her argument, therefore, we first study section 12652's relevant content.

Section 12652 sets forth procedures for the Attorney General to follow in suing persons who have knowingly made a false claim for payment against the government and performed other acts that violate section 12651. The Attorney General must serve notice on the prosecuting authority of a political subdivision if the false claim involved that entity's funds as well as state funds. (§ 12652, subd. (a)(2).) The prosecuting authority may intervene in the suit. (§ 12652, subd. (a)(3).) A prosecuting authority that initiates a civil action for violation of section 12651 must notify the Attorney General, who may take primary responsibility for maintaining the action. (§ 12652, subd. (b)(2), (3).) A person may bring a civil action for a percent of the proceeds for a violation "of this article" as a qui tam plaintiff. (§ 12652, subd. (c)(1).) "Once filed, the action may be dismissed only with the written consent of the court ... ." (*Ibid.*) Qui tam plaintiffs shall file their complaints in superior court in camera. The statute gives the Attorney General and any involved political subdivision 60 days to decide whether to proceed with the action. If the Attorney General's office or the government agency does so, it takes primary responsibility for prosecuting the action. It may then dismiss or settle the action without the qui tam plaintiff's consent. (§ 12652, subds. (c)(4), (6), (e).)

Section 12652, subdivision (d)(4), explicitly provides, "No court shall have jurisdiction over [a qui tam action] based upon information discovered by a present or former employee of [the government] during the course of his or her employment *unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless [the government] failed to act on the information provided within a reasonable period of time.*" (Italics added.) As the Regents observe, this disclosure requirement for qui tam plaintiffs is designed to prevent unjust enrichment of public employees who may have access to information concerning false claims and who may be uniquely situated to detect fraud. Therefore, before employees may reap the financial rewards that are available to qui tam plaintiffs, they must first apprise their public employer of the false claims and allow it to investigate and seek to recover any falsely claimed sums. Employees may proceed as qui tam plaintiffs against a defrauding party only if they have advised their public employer of the alleged fraud and it has failed to act. (§ 12562, subd. (d)(4).)

Campbell characterizes the disclosure requirement for qui tam plaintiffs as a statutory requirement to exhaust administrative remedies. But she misunderstands the statute. Although it contains the words "exhausted" and "internal procedures," the statute does not address employees' grievances in cases where employees must seek administrative remedies. The qui tam plaintiff disclosure requirements are unique to the qui tam setting. They ensure that public employers will have the opportunity to investigate and pursue fraud claims against third parties before the employees can initiate any qui tam action against those parties. In other words, section 12652, subdivision (d)(4), concerns

administrative *procedures* that employees must follow when they report false claims third parties have made against the government and recover funds they have lost. By contrast, the cases from *Westlake* to *Schifando* concern administrative *remedies* that an employer provides when an employee has a grievance against it. Because section 12652, subdivision (d)(4), does not address an employee's remedy for an alleged grievance, it is irrelevant to our interpretation of section 12653, subdivision (c), regarding application of the exhaustion rule.

Campbell's reliance on the specific exhaustion requirements in section 8547.10, subdivision (c), of the California Whistleblower Protection Act is equally unavailing. That statute provides that any person who intentionally retaliates against a University of California employee for "having made a protected disclosure" shall be liable for damages in an action the injured employee may bring. (*Ibid.*) Section 8547.2 defines the term "protected disclosure" as "any good faith communication that discloses or demonstrates an intention to disclose information" about improper governmental activity or any condition that threatens public or employee health or safety. (§ 8547.2, subd. (d).) This definition does not exclude communications to governmental or law enforcement agencies.[4]

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[4] Section 8547.10 was amended by Statutes 1999, chapter 673 (1997-1998 Reg. Sess.), section 7, so that "made a protected disclosure" replaced the term "disclosed improper governmental activities." The same bill added the definition of "protected disclosure" to section 8547.2. The change in terminology does not change our analysis of the effect of section 8547.10, subdivision (c), on the present action.

As the Regents observe, the statute permits aggrieved university employees to file a damages action provided they have followed the administrative procedures and filed an administrative complaint before filing their lawsuit. (§ 8547.10, subd. (a).) Of note here, the employee may not proceed with a court action against the university unless that institution has failed to reach an administrative decision on the action within specified time limits. (§ 8547.10, subd. (c).) In such a case, the employee may file a lawsuit for damages even though the administrative complaint is pending. If, by contrast, the university has reached a decision on the administrative action, the statute does not authorize any statutory damages action.

Campbell contends that because section 8547.10, subdivision (c), includes an explicit exhaustion requirement, section 12653, subdivision (c)'s silence on the issue must be deliberate. She claims we are thus required to find that the latter statute does not require her to have exhausted her administrative remedies before filing the present action. We disagree. By enacting section 8547.10, the Legislature created a specific exception to the administrative remedy rule. This exemption was intended to augment other internal administrative procedures available to university employees. As the Court of Appeal observed, the express mention in one statute of a fundamental precondition of filing suit against an administrative agency does not abrogate that requirement in every statute that is silent on the matter. (*Flores v. Los Angeles Turf Club* (1961) 55 Cal.2d 736, 746-747 [13 Cal. Rptr. 201, 361 P.2d 921] [legislative silence on the exhaustion requirement does not manifest a legislative intent to [*328] eliminate it]; see also *A. Teichert & Son, Inc. v. State of Cal.* (1965) 238 Cal. App. 2d 736, 746 [48 Cal. Rptr. 225], disapproved on another ground by *E.H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 792 [56 Cal. Rptr.

479, 423 P.2d 551].) The Legislature's language in the context of section 8547.10 says nothing about its intent under section 12653, subdivision (c). Indeed, the Legislature's silence in the latter statute makes the common law exhaustion rule applicable here and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit.

Campbell also mistakenly relies on *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 293 [188 Cal. Rptr. 159], contending it holds that courts will not impose an administrative remedies exhaustion requirement unless the statute specifically mandates one. In *Hentzel*, the employee plaintiff sued for wrongful discharge, alleging four common law causes of action. (*Id.* at p. 293) The Court of Appeal addressed the tort cause of action for wrongful discharge in retaliation for the plaintiff's attempt to obtain a reasonably smoke-free work environment. The employee's allegation brought him within the scope of Labor Code section 6310, which is part of the California Occupational Safety and Health Act legislation. Labor Code section 6312 provides an administrative remedy for an employee who is discharged in violation of Labor Code section 6310. (Lab. Code, § 6312 [upon complaint, Division of Labor Standards Enforcement shall investigate; if there was a violation of Labor Code, section 6310 found, it shall bring an action on behalf of employee for back wages and injunctive relief].) The defendant employer claimed the plaintiff's failure to satisfy exhaustion requirements barred the lawsuit. (*Hentzel, supra,* 138 Cal. App. 3d at p. 300.)

The *Hentzel* court found that the suit was not barred. It held that "[w]here a statute creates a right that did not exist at common law, and provides a comprehensive system of administrative enforcement, a requirement that administrative remedies be exhausted may be implied. [Citation.] But,

generally, 'where a statutory remedy is provided for the enforcement of a pre-existing *common-law* right, the newer statutory remedy will be considered only cumulative.'" (*Hentzel, supra,* 138 Cal. App. 3d at p. 303.)

Campbell did not plead a wrongful discharge common law tort. Her amended complaint sought damages under section 12653 and Labor Code section 1102.5, statutes that create a right that did not exist at common law. Similarly, UCSF's Policies and Procedures, which are equivalent to a statute, also create a right that did not exist at common law and provide a comprehensive system of administrative enforcement. Under *Hentzel's* rationale, we may infer a requirement that Campbell exhaust administrative remedies. (See also *Grant v. Superior Court* (1978) 80 Cal. App. 3d 606, 609 [145 Cal. Rptr. 699] [finding exhaustion doctrine applies under Public Resources Code section 30801 even though statute is silent on doctrine and Legislature provides no express exemption from it].)

b. Labor Code section 1102.5

Campbell also seeks relief under Labor Code section 1102.5.[5] Subdivision (b) of that section provides that no employer may retaliate against an employee for disclosing to a government or law enforcement agency information about

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[5] As the Regents observe in their letter brief of September 10, 2004, the Legislature recently amended Labor Code sections 1102.5 and 1106 in order to add a number of whistleblower-related provisions and additional penalties. (Lab. Code, §§ 1102.5, 1106, amended by Stats. 2003, ch. 484, §§ 2, 7.) The amendments, however, do not mention exhaustion requirements, nor do they suggest that the exhaustion rule is inapplicable to whistleblower actions filed under section 1102.5.

violations of law or failure to comply with regulations. For purposes of Labor Code sections 1102.5 to 1105, Labor Code section 1106 defines "employee" as including employees of the University of California.

Labor Code section 1105 states, "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." Campbell contends that this provision, together with the chapter's silence on administrative remedies, the effect of which we discuss *ante*, at pages 16-17, means that employees need not satisfy any exhaustion requirement before they may file a lawsuit under Labor Code section 1102.5.

But this contention also ignores the provision's context. Labor Code section 1103 provides misdemeanor criminal penalties for a violation of the chapter. Labor Code section 1104 makes the employer responsible for the acts of all managers, agents, and employees "[i]n all prosecutions under this chapter." The placement of Labor Code section 1105 immediately after the provisions for criminal prosecution of violations of the chapter seems intended to preserve employees' rights to file civil complaints for such violations. The context of Labor Code section 1105, as well as the past 60 years of California law on administrative remedies, argues against its abrogating the exhaustion requirement.

In addition, Labor Code section 1102.5's silence on the exhaustion requirement does not change our interpretation. As discussed *ante,* at page 327, and as *Torres* recognized, "courts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication." (*Torres, supra,* 15 Cal.4th at p. 779.)

Campbell also asserts that the legislative history of Assembly Bill No. 3486 (1991-1992 Reg. Sess.), later codified as Labor Code section 1106, shows that the Legislature intended Labor Code section 1102.5 to except University of California employees from the requirement to exhaust administrative remedies. As noted above, statutory construction begins with the statute's language. (*Torres*, *supra*, 15 Cal.4th at p. 777.) In 2000, when Campbell filed her superior court suit, Labor Code section 1106 stated in part: "For purposes of Sections 1102.5, 1103, 1104, and 1105, 'employee' includes, but is not limited to, any individual employed by ... the University of California." The statute's plain language also does not support Campbell's contention. The addition of section 1106 to the Labor Code was intended to extend the rights available to private employees to include public employees, and nothing more.

Campbell argues otherwise. She emphasizes that the Assembly Committee on Labor and Employment, chaired by the bill's author, did report on April 8, 1992, that the bill would give public employees the right to file a private action without having to exhaust administrative remedies. The Assembly Ways and Means Committee repeated this analysis on May 20, 1992. (Assem. Com. on Ways and Means, Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended Apr. 21, 1992, p. 1.)

But when the bill reached the Senate, the analysis no longer mentioned the exhaustion of administrative remedies. The Senate Committee on Industrial Relations explained that while existing law prohibited employers from retaliating against employees who disclosed to governmental or law enforcement agencies information relating to violations of state or federal law, "These provisions are silent as to their applicability to public employees. Generally, however,

provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees." (Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended Apr. 21, 1992, p. 2.) The report explained that the bill arose from a case in which a local building inspector complained of retaliation because he reported to the police that his supervisor had ordered him to violate the building inspection law. (*Id.* at p. 3.) The district attorney declined to prosecute the supervisor, however, because the Labor Code's antiretaliation provisions applied to private sector employees only. (*Ibid.*)

The Senate Rules Committee's Third Reading Analysis reported these arguments to support the bill: It would give public employees the same right of redress against retaliation for whistleblowing as the private sector enjoys; it would encourage employees to report illegal activities without fear of retaliation; state employees' existing remedies were meaningless because they were required to prove malice; public employees had little protection because they had to file a complaint following the local agency's procedures, and the supervisor who was responsible for the retaliation often heard the first level of grievance. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended Apr. 21, 1992, pp. 2-3.) The Assembly Committee on Labor and Employment, chaired by the bill's author, offered a Fact Sheet on Assembly Bill No. 3486 as amended (1991-1992 Reg. Sess.) which included this question and answer: "Doesn't this bill produce a duplication of procedures? No. A public employer may still require whistleblowers to follow their current procedures. This bill just empowers prosecutors and whistleblowers to seek court action without proving malice." (Assem. Com. on Labor and Employment, Fact Sheet on Assem. Bill No. 3486

(1991-1992 Reg. Sess.), Apr. 21, 1992, p. 1.) The Senate Floor Statement on the bill reiterated the argument about eliminating the need to prove malice in a prosecution; it did not mention elimination of the requirement to exhaust administrative remedies. (*Id.* at p. 2) In sum, the legislative history is equivocal, initially indicating that the bill's author intended the bill to abrogate the exhaustion requirement, but later on revealing that the Legislature may have rejected that intent in the statute it actually enacted. In our view, therefore, the legislative history appears unclear on the question whether the Legislature intended to depart from the exhaustion doctrine when it drafted Assembly Bill No. 3486, and we cannot read that intent into the statute when the history does not clearly support it.

4. Choice of remedies

Campbell alternatively contends that even if we find an "implied" administrative remedies exhaustion requirement under section 12653 subdivision (c), and Labor Code section 1102.5, she should be able to choose between pursuing an administrative or a judicial remedy. To support her contention, she relies on *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684, 689 [290 P.2d 520] (*Susanville*).

In *Susanville*, a city council had awarded the respondent a contract for public improvements. Four days later, at a special meeting held without notice to the respondent, the council passed a resolution declaring the respondent to be an unlicensed contractor unqualified to bid, and awarded the contract to another bidder. The city then brought an action against the respondent in superior court, in accord with the provisions of former Streets and Highways Code sections

5265 to 5270.[6] The superior court found in favor of the city. When respondent appealed to this court, the city argued that the respondent had failed to exhaust its administrative remedy as required by Streets and Highways Code section 5003 because the statute provided that the exclusive remedy of anyone aggrieved by error, irregularity, informality, neglect, or omission in the proceedings which awarded a public improvements contract, shall be by appeal to the legislative body. (*Susanville, supra,* 45 Cal.2d at p. 690.) We rejected the city's contention and found that the former Streets and Highways Code provided for an alternative remedy. We held: "It is equally well settled that where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute, elects to use the judicial one." (*Id.* at p. 689.) *Susanville* is inapposite. In the present action, no legislation corresponds to the detailed procedures for judicial remedy found in the former Streets and Highways Code.

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[6] Former Streets and Highways Code section 5265 provided that "the legislative body conducting the proceedings may bring an action in the superior court . . . to determine the validity of such proceedings and . . . of any contract entered . . . pursuant thereto." Former section 5266 provided that the contractor may also bring such an action. Former section 5267 specified that the action is in rem and specified that summons is by publication. Former section 5268 provided that anyone may appear and contest or uphold the validity of the proceedings and of the contract. Former section 5269 provided whom to serve if the contractor brought the action. Former section 5270 provided that appeal may be made to the Supreme Court, and provided the time limit for actions and appeals.

5. Equal protection

Campbell also asserts that requiring public employees who disclose false claims against a public entity to exhaust their administrative remedies when seeking redress for retaliation places a content-based restriction on their freedom of speech. Campbell contends that by treating public employee whistleblowing differently from private employee whistleblowing, the lower court made an impermissible content-based discrimination against a type of speech. (See *Police Dept. of Chicago v. Mosley* (1968) 408 U.S. 92, 95 [92 S. Ct. 2286, 33 L. Ed. 2d 212].) *Mosley* found unconstitutional an ordinance that prohibited non-labor picketing. (*Ibid.*) But requiring public employees to exhaust their administrative remedies as a prerequisite to pursuing their claims of retaliatory discharge in superior court does not restrict their freedom to disclose false claims.

Campbell also contends that the exhaustion requirement selectively discriminates on the basis of viewpoint because it precludes lawsuits against public entities. This claim misstates the effect of the exhaustion requirement, because judicial review of the administrative determination is available via administrative mandamus. (Code Civ. Proc., § 1094.5.)

III. CONCLUSION

We conclude that absent a clear indication of legislative intent, we should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies. Campbell has not shown that she either attempted to exhaust her administrative remedies or that she should be excused from doing so. We therefore find that Campbell has not shown that she could cure the defects in her second amended complaint by amendment, even though the trial

court gave her ample opportunity to do so, and we find no abuse of discretion in the trial court's denying leave to amend. We hold that Campbell should have exhausted the university administrative remedies before proceeding to suit, and affirm the Court of Appeal's judgment.

CHIN, J.

WE CONCUR:

George, C. J.
Kennard, J.
Baxter, J.
Werdegar, J.
Brown, J.
Moreno, J.

APPENDIX B

COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

A097560

[Filed December 23, 2002]

JANET CAMPBELL, Plaintiff and Appellant,	)
v.	)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	)

On Appeal From
San Francisco County Super. Ct.
No. 312736

JUDGES: Marchiano, P.J.
We concur: Stein, J. Margulies, J.

OPINION

Appellant Janet Campbell filed a "whistle-blower" complaint seeking damages from respondent Regents of the

University of California (the Regents). The trial court sustained the Regents' demurrer without leave to amend, on the ground that appellant had failed to exhaust her administrative remedies and had not shown justification for that failure. On appeal from the subsequent judgment of dismissal, appellant contends she was not required to exhaust her remedies and in any case was not adequately informed by the Regents of an exhaustion requirement. We disagree with appellant's contentions and affirm.

I. FACTS

At the demurrer stage we assume the truth of the material facts properly pled in the plaintiff's operative pleading, in this case appellant's second amended complaint. (See *Garcia* v. *Superior Court* (1990) 50 Cal.3d 728, 732, 268 Cal. Rptr. 779, 789 P.2d 960.) We may also take into account matters that can be judicially noticed. (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.)

We may also consider documents attached to the complaint as exhibits. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 901, p. 361.) If recitals in those documents are inconsistent with the allegations of the complaint, the recitals take precedence—and allegations inconsistent with the documents' unambiguous text will be disregarded. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 392, p. 489; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 720-721, disapproved on unrelated ground *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10, 969 P.2d 564.)

Appellant worked for the Regents as a senior architect in the Architectural Design and Engineering Unit of the Facilities Management Department (FMD) at the University

of California at San Francisco (UCSF). Appellant prepared and reviewed architectural plans and specifications for all campus construction projects costing less than $250,000, to ensure that the projects were technically sound and complied with all applicable legal requirements—including competitive bidding laws.

The second amended complaint alleges that California law requires competitive bidding on public works projects: "Public Contracts Code Section 3400 provides that no instrumentality of the state or public office charged with the letting of public works contracts shall draft or cause to be drafted specifications for bids in such a manner as to limit the bidding, directly or indirectly, to any one specific concern, except in certain circumstances not applicable in this lawsuit."

The pleading further alleges that "Section 3400 also prohibits the use of brand names to specify any material, product, thing, or service unless the specification also includes at least two other brands or trade names of comparable quality or utility and is followed by the words 'or equal' so that bidders may furnish . . . any equal material, product[,] thing, or service."

In 1991, the Regents began to instruct appellant to prepare or help prepare bid documents that illegally eliminated competition. These bid documents, inter alia, used restrictive specifications; specified products by brand name only; included performance specifications in excess of those actually needed for a job; and used "other restrictive requirements that limited competition to one manufacturer of roofing products and their small number of certified contractors."

Appellant protested to the Regents on several occasions that the FMD's use of these bid documents violated state competitive bidding laws. Her opposition to the FMD's use of the illegal bid documents was "well known" to the Regents.

Appellant reported the FMD's ongoing violation of the state competitive bidding laws to the FBI. Appellant's report to the FBI concerned "a matter of public concern" and "violations of state laws and regulations"—not the terms and conditions of her employment.

In the fall of 1997, the FBI questioned UCSF officials about the competitive bidding violations reported by appellant. On appellant's information and belief, the Regents knew that appellant was the source of the FBI's information.

The Regents immediately retaliated against appellant for her FBI report by changing her job assignment, removing her from "meaningful and substantial work," and leaving her with "menial and lesser projects." She soon went on extended disability leave. She returned to work in January 1999. She was almost immediately terminated, supposedly due to downsizing. But appellant "was selected from among several co-workers for termination under irregular circumstances in which . . . less senior and less qualified co-workers were retained in preference to her." The Regents "selected [appellant] for termination in retaliation for her report to the FBI."

On March 4, 1999, appellant filed an internal complaint against her supervisors and UCSF, using the Regents' formal employee grievance procedure. At that time, appellant was represented by an attorney, Pamela E. Smith. Appellant's

grievance complaint alleged retaliation against her for being a whistle-blower.[1]

On April 23, 1999, Guy Zuzovsky, a senior client services analyst in UCSF's Department of Labor and Employee Relations, responded to appellant's grievance complaint by a letter to appellant's counsel. The Zuzovsky letter is attached to the second amended complaint as exhibit 1, and is incorporated by reference into the pleading.

The letter informs appellant that "Allegations of retaliation for whistle blowing activity fall outside the scope of the PPSM [Personnel Policies for Staff Members] and, therefore, are excluded from the complaint resolution process. Such complaints are properly filed under the UCSF Policy and Procedures for Reporting Improper Governmental Activities and Protection Against Retaliation for Reporting Improper Activities [hereafter "Policy and Procedures"], a copy of which is enclosed with this letter. Alleged violations of state and federal laws will be excluded from the complaint resolution process."

The Regents' Policy and Procedures are also attached to the second amended complaint as exhibit 2, and are referenced in appellant's allegations. Moreover, the Regents' Policy and Procedures may be judicially noticed. (See *Scharf v. Regents of University of California* (1991) 234 Cal. App. 3d 1393, 1398, fn. 3, 286 Cal. Rptr. 227; *Mendoza v. Regents of University of California* (1978) 78 Cal. App. 3d 168, 176, fn. 3, 144 Cal. Rptr. 117.)

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[1] The grievance complaint alleged other matters not germane to this appeal.

As discussed in detail below, the Zuzovsky letter informed plaintiff that the usual formal grievance procedures were inapplicable, and she had to avail herself of a separate set of grievance procedures tailored to whistle-blowing complaints. But despite the directions given by the Zuzovsky letter, appellant did not file a grievance complaint under the Policy and Procedures.

On June 7, 2000, appellant filed her original whistle-blower complaint against the Regents, seeking damages for retaliatory termination under Government Code section 12653, a component of the False Claims Act (section 12653) and Labor Code section 1102.5 (section 1102.5).[2] She alleged she had either exhausted all administrative remedies or was not required to. She alleged that the Zuzovsky letter "excluded" all of her claims "from the scope of the administrative proceeding."

The Regents demurred, arguing appellant had failed to exhaust administrative remedies because she had failed to file a grievance under the Policy and Procedures--despite having been instructed to do so by the Zuzovsky letter. Appellant responded with a legal argument that by their plain terms, sections 12653 and 1102.5 did not require exhaustion of administrative remedies as a precondition of filing a lawsuit. She did not address the issue of the availability of the Policy and Procedures grievance mechanism, or the meaning of the Zuzovsky letter.

The trial court sustained the demurrer with leave to amend "to allege exhaustion of administrative remedy or other valid

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[2] The original complaint alleged other causes of action which were omitted from subsequent pleadings.

excuse for failure to comply with administrative procedures," citing *Edgren v. Regents of University of California* (1984) 158 Cal. App. 3d 515, 205 Cal. Rptr. 6 (*Edgren*).

Appellant filed a first amended complaint on March 27, 2001. She alleged that she filed an internal grievance complaint under the Regents' "formal grievance procedures," even though she was "not required to." She again referred to the Zuzovsky letter, alleging that it "informed [her] that [her] grievance . . . was outside the scope of [the Regents'] grievance procedures and was therefore excluded from the Regents' grievance procedures." Appellant further alleged that the wording of sections 12653 and 1102.5 did not require, as a matter of law, that she exhaust administrative remedies.

The Regents again demurred, arguing that appellant had failed to plead either exhaustion or any recognized exception to the exhaustion requirement. Appellant again responded with the legal argument that the language of sections 12653 and 1102.5 does not require exhaustion of administrative remedies. She also briefly argued that the Regents' grievance procedures were inadequate, an argument she has not renewed on appeal.

The record suggests that at oral argument on the demurrer, appellant argued she was not obligated to exhaust administrative remedies under the rule of *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 131 Cal. Rptr. 90, 551 P.2d 410 (*Westlake*) because the Regents had failed to adequately notify her of applicable grievance procedures. The trial court sustained the demurrer to the first amended complaint with leave to amend "to plead facts[,] if [appellant] can do so in good faith[,] of 'futility' and 'failure to apprise of administrative proceedings.'"

Appellant filed her second amended complaint on August 8, 2001. She did not allege facts supporting futility, but did attempt to allege she was not adequately informed of the administrative proceedings.

The second amended complaint repeated the allegation that the Zuzovsky letter "informed [appellant] that [her] whistle-blowing allegations were outside the scope of [the Regents'] grievance procedures and were therefore excluded from the Regents' grievance procedures."

Appellant further alleged the letter did not inform her that she "must grieve her whistle-blowing claims" and that her failure to do so would preclude legal action. She alleged that the Policy and Procedures states that a party "may" file a retaliation complaint, and thus such a complaint was not mandatory. She charged that the Policy and Procedures did not inform her that she must file a grievance under the Policy and Procedures or forfeit her right to pursue a lawsuit. Her allegations concluded with a claim that the Regents were estopped from arguing failure to exhaust because they had failed to inform her of "the necessity to file a grievance under the whistle-blowing policy."

But the clear text of the Zuzovsky letter and the Policy and Procedures contradict these allegations and present an accurate and complete picture. Since the letter and the Policy and Procedures are attached to the second amended complaint as exhibits, their unambiguous text controls over inconsistent allegations in the pleading.

The Zuzovsky letter unambiguously informs appellant that the normal grievance procedures do not apply, and that her whistle-blowing grievance is outside their scope. Rather, the whistle-blowing grievance is governed by the Policy and

Procedures, in part because it involves violation of state law as opposed to a typical personnel grievance.

The Policy and Procedures, while couched in more formal legalese, are also unambiguous. Section V of the Policy and Procedures provides that any person, including an employee of the Regents, may file a confidential complaint regarding "improper governmental activities." "Improper governmental activities" are defined to include violations of state and federal law.

After describing the scope of any such confidential complaint and the investigative and decision process, the Policy and Procedures conclude with section IX, roughly two full pages in length, entitled "Procedures for Protection Against Retaliation for Reporting Improper Activities."

Section IX (A) provides, as here pertinent, that "Any UC employee . . . may file a written complaint against a University employee alleging threatened or actual interference or retaliation resulting from the reporting of improper activities . . . . Retaliation is defined as the use of official authority or influence by a UC employee for the purpose of interfering with the right of a person to file a report as described in Section V above, or the right to file such a report with the University Auditor or with the Auditor General of the State of California, or with other public officials designated to receive reports of improper activity. Use of 'official authority to influence' includes promising to confer, or conferring, any benefit; effecting or threatening to effect any reprisal; or taking, or directing others to take, or recommending, processing or approving any personnel action, including but not limited to appointment, promotion, transfer assignment, performance evaluation, suspension, or other disciplinary action."

The balance of section IX (A) contains detailed provisions governing the contents of a retaliation complaint, the persons or entities with whom a complaint may be filed, and timeliness. Immediately after these provisions is a conspicuous paragraph headed "Use of Existing Mechanisms":

"A complaint of retaliation/interference must be filed under existing University grievance or complaint resolution procedures (including procedures in personnel program policies and collective bargaining agreements, and procedures established by the Academic Senate) *if acceptable under those procedures. If the complaint is not within the scope of any complaint resolution procedure available to the complainant under the appeals mechanism described in the previous paragraphs, . . . the complaint may be filed under this policy.*" (Italics added.)

Thus, the Zuzovsky letter informed appellant that (1) the normal, personnel-manual grievance procedure was inapplicable to her grievance complaint because she alleged violations of state law, and (2) appellant was required to file her grievance under the Policy and Procedures. In other words, the Zuzovsky letter simply informed appellant that her whistle-blowing claims were subject to a separate set of internal grievance procedures.

The Regents demurred to the second amended complaint, arguing that appellant had not alleged that exhaustion of administrative remedies would have been futile, or that she fell under any other exception to the exhaustion requirement. The Regents also argued that appellant was properly advised of the applicable grievance procedures under *Westlake*.

In response, appellant repeated her legal arguments that the two statutes at issue do not require exhaustion. She also argued the Zuzovsky letter and the Policy and Procedures misled her into thinking she did not have to file an administrative grievance as a precursor to bringing a lawsuit.

The trial court sustained the Regents' demurrer to the second amended complaint without leave to amend and dismissed the action.

II. DISCUSSION

Appellant contends the trial court erred because (1) the language of sections 12653 and 1102.5 does not require exhaustion of administrative remedies, and (2) even if exhaustion was required the Regents are estopped from relying on exhaustion because they did not adequately inform her of the need to file a grievance. We disagree.

Generally, a party seeking legal remedies against an administrative agency must exhaust administrative remedies before a court can act. The failure to exhaust remedies deprives the court of jurisdiction. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293, 109 P.2d 942; *Edgren, supra,* 158 Cal. App. 3d at p. 520; *Morton v. Superior Court* (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533.) "Before seeking judicial review a party must show that she has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings. [Citations.]" (*Bleeck v. State Board of Optometry* (1971) 18 Cal. App. 3d 415, 432, 95 Cal. Rptr. 860.)

There are four recognized exceptions to the exhaustion requirement. A party need not exhaust her administrative

remedies (1) when the subject of the controversy lies outside the administrative agency's jurisdiction; (2) when pursuing an administrative remedy would result in irreparable harm; (3) when the agency cannot grant an adequate remedy; and (4) when the party can positively state what the administrative agency's decision will be—i.e., the "futility" exception. (See *Edgren, supra,* 158 Cal. App. 3d at pp. 520-521; *Ogo Associates v. City of Torrance* (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761.)

In addition, our Supreme Court has held that an administrative agency cannot rely on the exhaustion doctrine when it fails to inform the aggrieved party of her right to file a grievance. (*Westlake, supra,* 17 Cal.3d at pp. 477-478.)

There is no question that the Regents are an administrative agency within the meaning of the exhaustion doctrine. (See *Edgren, supra,* 158 Cal. App. 3d at pp. 520-522 & p. 522, fn. 1.) There is also no question that appellant does not qualify for any of the four exceptions to the doctrine.

But appellant contends the doctrine of exhaustion of administrative remedies does not apply to her action against the Regents. She seeks damages under sections 12653 and 1102.5, both of which provide damages and other remedies for employees who are retaliated against for disclosing information to a government or law enforcement agency regarding false claims or violations of law.[3] Appellant claims that in light of the wording of the two statutes, there is no

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[3] We discuss the two statutes generally collectively. For our purposes, it is not necessary to discus their provisions at any length or distinguish between their specific terms.

requirement for exhaustion before a lawsuit based on the statutes may be brought.

Appellant relies on language in both statutes authorizing an aggrieved employee to seek legal remedies. Section 12653, subdivision (c) spells out the types of relief to which an aggrieved employee may be entitled--such as damages, reinstatement, and back pay--and concludes, "An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision." Section 1102.5 prevents an employer from retaliating against an employee for whistle-blowing; a companion statute, Labor Code section 1105, provides that "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter."

Appellant argues that because this statutory language omits any specific reference to a requirement of exhaustion of administrative remedies, the Legislature must have intended for the injured worker to forego such remedies and proceed directly to court. We disagree. Every statute authorizing or confirming a right to seek legal redress does not have to contain a specific mention of the exhaustion requirement, which is fundamental to administrative law. The statutory authorization of a right to file a lawsuit actually works against appellant's argument. By authorizing legal action, the Legislature contemplates the necessary (and jurisdictional) precondition to that action--the exhaustion of administrative remedies.

Appellant presents no direct authority in favor of her position. Rather, she points to language in a separate component of the False Claims Act, Government Code section 12652, which involves lawsuits by the Attorney

General or by a qui tam plaintiff against persons who have improperly spent state funds. Government Code section 12652, subdivision (d)(4) refers to the requirement that a qui tam plaintiff exhaust administrative remedies before filing suit. Appellant argues that by mentioning exhaustion in one statute, but not mentioning exhaustion in another (i.e., section 12653) the Legislature necessarily intended to eliminate the exhaustion requirement with regard to the silent statute.

The express mention in one particular statute of a fundamental precondition of bringing suit against an administrative agency does not implicitly abrogate that requirement in every statute silent on the matter. Many statutes authorize legal action but do not expressly mention the exhaustion requirement--no more than they expressly mention fundamental requirements such as standing, ripeness, or lack of mootness. And as the Regents observe, the exhaustion requirement is not statute-specific, but flows from appellant's status as an employee seeking damages from her employer--an administrative agency which has provided an administrative remedy which must be exhausted before any type of judicial relief is sought. (See *Morton v. Superior Court, supra,* 9 Cal. App. 3d at p. 982; see also *Westlake, supra,* 17 Cal.3d at pp. 469, 474-477.) Indeed, as a "constitutionally created agency" the Regents exercise "quasi-adjudicatory powers over personnel matters involving university employees. [Citation.]" (*Edgren, supra,* 158 Cal. App. 3d at p. 522, fn. 1.)[4]

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[4] There is one case which held that an employee did not have to exhaust the administrative remedies provided by her employer, but that case is distinguishable. In *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1284-1285, 261 Cal. Rptr. 204 (*Watson*), the court held that a state employee did not have to exhaust her administrative civil service remedies because

Appellant also argues, apparently for the first time on appeal, that the trial court's ruling deprives her of equal protection of the laws. As we understand her argument, appellant claims that (1) section 12653 does not require exhaustion of administrative remedies, but (2) the trial court in essence ruled that it does require exhaustion in the case of University of California (UC) employees, thereby (3) treating UC employees differently from non-UC employees suing under the statute.

The first premise of the argument, that section 12653 does not require exhaustion, is false, as explained above. Moreover, all employees of the Regents are treated in the same way with the same exhaustion of remedies requirement. Employees of a constitutionally created entity are not the same as employees in the private sector. There is no equal protection violation here.

Finally, appellant contends that even if exhaustion is required, the Regents are estopped from relying on the exhaustion doctrine because they failed to adequately inform appellant of her need to file an internal grievance under the Policy and Procedures and that her failure to do so would preclude suit.

This argument is also without merit. First, appellant has not met the heavy burden of obtaining estoppel against a public agency. (See *Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 990.)

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she had the right to avail herself of alternative administrative remedies available under California's Fair Employment and Housing Act. (Gov. Code, § 12940 et seq.) That is not the case here--and in any case the employee in *Watson* still had to exhaust whichever remedy she chose. Appellant has failed to exhaust.

Second, the Regents *did* inform appellant, by the Zuzovsky letter, of the need to file a grievance under the Policy and Procedures. Appellant's claim that the letter and the Policy and Procedures are unclear is belied by the unambiguous language quoted above. Appellant's claim that the letter and Policy and Procedures were misleading, especially to a layperson, is disingenuous—especially since appellant was represented by counsel.[5] Even if the Regents gave appellant incorrect or misleading advice on matters of law, appellant would not be entitled to successfully urge estoppel to avoid the requirement of exhaustion. (See *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449-1450.)

Third, as we read *Westlake* the Regents only needed to inform appellant of the grievance procedure. Any failure to inform appellant of the *legal consequences* of the failure to grieve—i.e., preclusion of suit--does not relieve appellant of the fundamental requirement of exhaustion of administrative remedies. Appellant cites no authority to the contrary.

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[5] Appellant suggests the Policy and Procedures appear to apply only to internal whistle-blowing reports, not reports to an outside agency. But the Policy and Procedures protects from retaliation a UC employee reporting law violations to "public officials designated to receive reports of improper activity"--and that would include agents of the FBI.

III. DISPOSITION

The judgment of dismissal is affirmed.

/s/ _____
Marchiano, P.J.

We concur:

/s/ _____
Stein, J.

/s/ _____
Margulies, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Case No. 312736

[Filed November 29, 2001]

JANET CAMPBELL,	)
Plaintiff,	)
	)
v.	)
	)
REGENTS OF THE UNIVERSITY OF CALIFORNIA; GARY NELSON, in his individual capacity; and DOES 1-100,	)
Defendants.	)
	)

JUDGMENT OF DISMISSAL

This Court having sustained defendant The Regents of the University of California's demurrer to second amended complaint without leave to amend,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is dismissed, that plaintiff Janet Campbell shall take nothing by her complaint, and that The

Regents of the University of California shall recover its costs of suit incurred herein.

IT IS SO ORDERED.

Dated: Nov 27 2001

/s/_____
Hon. David A. Garcia

APPENDIX D

SUPREME COURT OF CALIFORNIA
En Banc

S113275

[Filed May 18, 2005]

JANET CAMPBELL	)
Plaintiff and Appellant,	)
	)
v.	)
	)
THE REGENTS OF THE	)
UNIVERSITY OF CALIFORNIA,	)
Defendant and Respondent.	)
	)

OPINION

Petition for rehearing DENIED.

/s/_____
Chief Justice

APPENDIX E

California Government Code
False Claims Act

12650. (a) This article shall be known and may be cited as the False Claims Act.

(b) For purposes of this article:

(1) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(2) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(A) Has actual knowledge of the information.

(B) Acts in deliberate ignorance of the truth or falsity of the information.

(C) Acts in reckless disregard of the truth or falsity of the information. Proof of specific intent to defraud is not required.

(3) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(4) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(5) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust.

12651. (a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim:

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described

in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision of the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article.

(e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title 1 or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code.

(f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.

12652. (a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person.

(2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on

the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action.

(c) (1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act.

(2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by

mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action.

(5) The Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal pursuant to paragraph (2). The motion may be supported by affidavits or other submissions in camera.

(6) Before the expiration of the 60-day period or any extensions obtained under paragraph (5), the Attorney General shall do either of the following:

(A) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted.

(B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(7) (A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence

and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer.

(B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action.

(C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera.

(D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted.

(ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action.

(8) (A) Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

Supreme Court, U.S.
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No. 05-233

In the Supreme Court of the United States

JANET CAMPBELL,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

I. PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF JANET CORAL CAMPBELL 1

A. A Bureaucratic Success Story 1

B. Compounded Error 7

C. The Keepers and the Kept 9

II. CONCLUSION 10

III. PETITIONER'S CERTIFICATE 11

TABLE OF AUTHORITIES

Page

Consumers Lobby Against Monopolies v. Public Utilities Com., 25 Cal.3d 891 (1979) 6

Ishimatsu v. Regents of Univ. of California, 266 Cal.App.2d 854 (1968) . . . . . *passim*

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 10

Morrison v. Olson, 487 U.S. 654 (1988) 1

Palmer v. Regents of University of California, 107 Cal.App.4th 899 (2003) 7, 8

In re Royer, 123 Cal. 614 (1899) 3, 6

Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557 (1936) 6

Tolman v. Underhill, 39 Cal.2d 708 (1952) 1, 6

Unix System Labs v. Berkeley Software Design, 832 F.Supp. 790 (N.J. 1993) 7

California Constitution and Statutes:

Cal. Const. Art. III, § 3 . . . . . 6, 3

Cal. Const. Art. VI, § 1 6

Cal. Const. Art. IX, § 9 . . . . . *passim*

Cal. Const. Art. XII, §§ 1-6 6

Cal. Const. Art. XXIV, § 3(a) 6

Ed. Code § 89030 (a) 5

Ed. Code § 89030 (b) 5

Ed. Code § 9030.1(a) 5

Ed. Code § 89030.1 (d) 5

Ed. Code § 89030 (e) 5

Gov. Code, § 8547 et seq. 2

Gov. Code, § 8547.10 (c) 3

Gov. Code § 11000 5

Gov. Code §§ 11340-11361 5

Cal. Labor Code, § 1101 et seq 2

Cal. Labor Code, § 1102.5 . . . . . 2, 8, 10

Cal. Labor Code, § 1106 2

Miscellaneous:

Clark Kerr, The Gold and the Blue, A Personal Memoir of the University of California, 1949-1967, Vol. 1, (University of California Press, Ltd., 2001) 3, 4

I. PETITION FOR REHEARING ON BEHALF OF JANET CORAL CAMPBELL

A. A Bureaucratic Success Story. In the words of late CHIEF JUSTICE REHNQUIST, *"[t]he gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications."* Morrison v. Olson (1988) 487 U.S. 654, 684. This is about one such bureaucratic success story, the gradual unfolding of which has had profound constitutional ramifications for many. In the Courts below, Petitioner has argued rulemaking and adjudicatory authority is necessarily limited within the UC system, excluding jurisdiction over the subject matter of her allegations. The Cal. Supreme Court (CSC) itself noted the Exhaustion Doctrine doesn't apply where "*the agency lacks authority to hear the complaint*" or where "*resolution of the controversy falls outside [the] scope of [the] grievance procedures,*" (App. A, supra, at 11a), but then declined to clarify how the subject matter of the controversy fits within Respondent's scope of authority, instead focusing on its *status*. Ibid at 6a-8a.

The limit of Respondent's rulemaking authority was clarified by the CSC in Tolman v. Underhill (1952) 39 Cal.2d 708, a case where UC faculty positions were withheld for refusal to take a loyalty oath required under UC policy. Id. at 709. The CSC distinguished between internal regulations that were "*exclusively university affairs*" and therefore within Respondent's jurisdiction and matters that are the subject of "*general statewide concern,*" which are not. If not *exclusively* an university affair, then "*laws passed by the Legislature . . . will prevail.*" Id. at 712. With respect to any overlap, *"Although the adoption of local rules supplementary to state law is proper under some circumstances, it is well settled that a local regulation is*

invalid if it attempts to impose additional requirements in a field which is fully occupied by statute." Id. Applying these principles, the CSC held that the loyalty of state employees is not a matter reasonably subject to "*different standards and different tests*" instead "*requiring uniform treatment throughout the state*" nor should UC employees "*remain subject to any such additional loyalty oaths. . . as the particular agency employing them might see fit to impose.*" Id. at 713.

To show that the Legislature intended *uniform treatment* for whistleblowers, Petitioner judicially noticed the CSC on the Legislative history of AB 3486, the 1992 amendment to Labor Code §1101 *et seq.* (App. F. supra, at 69a-72a), including analyses from the *Assembly Committee on Labor and Employment*, the *Ways & Means Committee* and the *Senate Rules Committee* - all of which reiterated their intent under the amendment to "*conform the rights of state and local government employees to those of private employees by . . . [p]ermitting employees to file a right of private action to recover damages without having to exhaust administrative procedures.*" UC employees were specifically named in said amendment under §1106. Ibid. at 72a. Petitioner argued that the Legislature intended to occupy and "*harmonize*" a field where §1102.5 applies when the whistleblower made protected disclosures to a law enforcement agency and, thus, it is no longer *exclusively an internal affair*, nor is the injury sustained as a result of doing so. Thus, *going back* after that time in order to exhaust internal procedures was never intended under the amendment. Petitioner's Brief on the Merits (PBM) 38-39. Petitioner further argued that the Legislature's intent to occupy the field is clear by the later enactment of Gov. Code § 8547 *et. seq.* covering situations where a whistleblower already made *internal* protected disclosures under UC Policy (App. G, supra, 74a-75a)

thereby raising a *statutory* exhaustion requirement under §8547.10 (c), (PBM 39), in deference to UC policies. In its Answering Brief on the Merits (ABM), Respondent arrogantly countered that the Legislature's "*occupation*" doesn't "*negate*" Respondent's "***status***" as a "*constitutionally-created administrative agency*" who made available "*internal grievance procedures*" and therefore "*the common law exhaustion doctrine applies, **whether or not the Legislature has 'occupied the field of whistle-blowing***" by statute. ABM 23, n. 13. (Emphasis added.)

Regarding this heavily touted status, as argued in the Petition for Rehearing below, authority and autonomy within the UC as delineated in In re Royer (1899) 123 Cal. 614 is necessarily limited; and never before 1968 was the UC mentioned as included under the Cal. Constitution as a *fourth branch of government.*[1] App. A, supra, at 7a. Instead, Respondent was included under Cal. Const. art. IX, § 9 (art. IX, 9) as a *state institution*, declared to be a "*public trust*" whose organization and government was required thereunder to be, "*perpetually continued in the form and character prescribed by the organic act.*" Royer, supra, 123 Cal. at 621. Until 1952 these legally prescribed lines of authority were respected,[2] the UC remaining "*a highly centralized institution*" in concern for retaining its constitutional *public trust* status. Clark Kerr, The Gold and the Blue, A Personal Memoir of the University of California, 1949-1967, (University of California Press, Ltd., 2001), p. 39, (Kerr). By the time rulemaking and adjudicatory authority were first

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[1] *The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.*" Cal. Const. Art. III, § 3.

[2] See, supra, Petition for Writ of Certiorari (Petition) 18, n. 17.

judicially scrutinized in Ishimatsu v. Regents of Univ. (1968) 266 Cal. App.2d 854, however, these legally-prescribed parameters were broken as the UC had undergone a "*massive reorganization of its governance*" under the direction of a former UC President, where, by 1965, it was characterized an *organizationally* and *operationally* decentralized *"federation of campuses"* with authority shifted from Respondent and the UC President (Kerr at 191) to chancellors and administrators with virtual autonomy at the campus level, (Ibid. at 46), functioning as heads of their own "*huge research enterprises.*" Ibid. at 191. Despite the constitutional implications,[3] UC administrators continued to command vast, undefined constitutional authority and autonomy, a more limited version of which was intended vested *in Respondent* for considered and controlled delegation.

Insight into some of the constitutional ramifications can be gleaned from Ishimatsu where a UC librarian alleging wrongful discharge requested her grievance be investigated under protective *academic* procedures under which she appeared to be covered. Ishimatsu, supra, 266 Cal.App.2d at 857. The UC President nevertheless ordered use of procedures for *nonacademics* under which the hearing officer

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[3] As a "primary agent" in the decentralization process, former UC President Kerr concedes "major neglect" in failing to realize the "ultimate limits," of a decentralized system now lacking any system of "formal checks and balances." Ibid. at 220. Under its culture of "campus self determination," for example, "one chancellor started to plan for a new medical school without prior authorization, four campuses were found in 1995 to have set up their own admissions policies and procedures contrary to regental policy, and a number of financial scandals have come to public attention in recent years." Furthermore, "their campuses generate more of the financing through tuitions, private fund raising, federal R&D projects, and auxiliary enterprises, all of which are not subject to as much central university influence as are state funds." Ibid. at 223.

assigned by the UC President sustained the dismissal, the Chancellor accepted the recommendation, and appeals denied. Id. On appeal, Ishimatsu argued that art. IX, 9 doesn't delegate to "*the university*" the power to exercise adjudicatory functions. Id. at 862. In consideration, the Court first observed that "*the University is a statewide administrative agency within the meaning of section 11000 et seq. of the Government Code*," (Id. at 863) - an assumption complicated by the fact that the UC is *sub silentio* exempted not only from Gov. Code § 11000, but also from the Cal. Administrative Procedures Act (*CAPA*), Gov. Code §§ 11340-11361.[4] The Court then proceeded to note that the source of Respondent's authority is also the Cal. Constitution, citing art. IX, 9's designation of the UC as a "*public trust*" to be administered by Respondent in its corporate form with:

> '. . .*all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued . . .and to delegate . . .*

---

[4] In contrast, the trustees of the California State University (CSU) System are also exempted under Gov. Code § 11000, but their exemption is *express* and they are nevertheless controlled by Edu. Code § 89030(a) wherein charged with responsibility to,"*adopt rules and regulations not inconsistent with the laws of this state.*" CSU regulations are also expressly exempted from the CAPA under Ed. Code § 89030 (b) but substantive and procedural safeguards are nevertheless required under Ed. Code § 89030.1, including initial review by the CSU trustees' office of general counsel for *necessity, authority, clarity, etc.*, (Ed. Code § 89030.1 (a)); the maintenance of a "*rulemaking file*" showing public notice requirements, (Ed. Code § 89030.1 (d)); transmission of the regulations as finally adopted to the Sec'y of State for filing (***which are not legally effective until such time***), and publication (Ed. Code § 89030.1(e)); as well as annual reporting requirements to the Governor, the Senate Education Committee, and the Assembly Higher Education Committee. Ed. Code § 89030.1(e).

such authority or functions as it may deem wise. . ." Id., citing Royer, supra, 23 Cal. at 614. (Emphasis added.)

For contextual purposes, language requisite to a finding of express adjudicatory authority is exemplified by Cal. Const. art. XII, §§ 1-6 where the Public Utilities Commission is conferred authority to "hold various types of hearings, . . . and establish its own procedures." Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 905. Instead of noting the lack of express authority under art. IX, 9's standard corporate enabling language, the Lower Court found an opinion proffered by the Cal. Attorney General persuasive on whether adjudicatory authority should be *implied* wherein Respondent was declared a, ***". . .branch of the state government equal and coordinate with the legislature, the judiciary and the executive.*** Id. at 864. (Emphasis added.) Adjudicatory authority was thus there held proper even though the CSC has long held adjudicatory authority for *statewide* agencies must be *expressly* conferred (or otherwise deemed vested in its "Courts of Record" under art. VI, §1); and furthermore long considering it "*elementary*" that statewide agencies cannot confer or expand their own adjudicatory authority, even with the concurrence of the Attorney General. Standard Oil Co. v. State Board of Equal. (1936) 6 Cal.2d 557, 559. Adjudicatory authority was thus there held proper despite (1) art. III, § 3's notice to its citizens that there are assuredly only three branches of government; (2) CSC precedent under Tolman and Royer well defining the parameters of any exercise of authority nevertheless intended for the Academic Senate under the Organic Act *and* strong question as to the extent any such authority can be wielded by administrators at autonomous campuses; and (3) the lack of substantive and procedural safeguards afforded all other public employees whose

employers are bound by the CAPA or a reasonable equivalent in their rulemaking and adjudicatory functions, (Petition 9, n. 5). Under this newly implied authority, Ishimatsu's dismissal was affirmed under a "*substantial evidence*" review of a record including a memorandum circulated ten months after her wrongful discharge grievance was filed. Ishimatsu, supra, 266 Cal. App.2d at 859. What is more, Ishimatsu continues to be cited as the leading case controlling not only the rights of UC employees, (see, e.g., App. A, supra, at 7a), though decided 10 years *before* the interest of a UC non-academic in continued employment was defined "*property*" subject to due process protection (Petition, at 10-11, n. 7); but also as controlling on the *breadth* of Respondent's unscrutinized, constitutionally-rogue fourth-branch-of-government status. (See, App. A, supra, at 7a [*"the Regents have been characterized as 'a branch of the state itself,'"*] and Unix System Laboratories v. Berkeley Software (N.J., 1993) 832 F.Supp. 790, 800 [noting, *"the University's' elevated status as a 'fourth branch of government'"* in finding *"the Regents"* share in California's Eleventh Amendment immunity].

B. Compounded Error. As also argued in the Petition for Rehearing in the CSC, evidence of UC employees' lack of equal protection in view of unchecked authority wielded by UC administrators is also apparent when juxtaposing Petitioner's case with the whistleblower's in Palmer. There Respondent *"explained"* to another appellate court that Palmer, (who also filed a grievance under the same PPSM alleging retaliation for participation in union activities but no whistleblowing allegations or reports to an outside law enforcement agency, *"had available **both** the general employee grievance procedure described in the . . .pamphlet entitled Personnel Policies for Staff Members (PPSM) and the more specific internal grievance process, "UCLA Procedures*

for Reporting Whistle Blowing Complaints" to address her whistleblowing claims. Palmer, 107 Cal.App. 4th at 903. This is clearly *not* what was represented to Petitioner. No response to the grievance was received for 7 weeks and at that time she was told she could *not* file whistleblowing allegations under the PPSM, but could permissively re-file under a separate set of procedures, but, *"[a]lleged violations of state and federal laws will be excluded from the complaint resolution process."* Petition, supra, 4. Though inconsistent with what Respondent's administrators represented, Palmer is consistent with what Petitioner argued in the Courts, below. Specifically, the Exhaustion Doctrine applies only when *internal* disclosures regarding *improper governmental activity* are made under UC policy, thereby constituting an *exclusively internal* UC affair and implicating the policies of the Exhaustion Doctrine. Again, where a whistleblower is already injured after "*disclosing information to a government or law enforcement agency*" (App. F, supra, at 69a), the matter is no longer *exclusively* an internal UC affair but one requiring *uniform treatment* under the law. *Going back* to exhaust internal procedures that were never triggered in the first place was clearly never intended by the Legislature after 1992 in view of its amendment to §1102.5 (PBM 37-39) which *equally* vested similarly situated whistleblowers with the right to access a court of law, whether injured by a private employer, public or one of a self-spun, arrogantly-touted *fourth branch of government*. App. F, supra, at 72a.

In response to being judicially noticed of the legislative history of the 1992 bill amending § 1102.5, to eliminate the Exhaustion Doctrine for its purposes, the CSC acknowledged the Legislature's intent to "*extend the rights available to private employees to include public employees.*" App. A, supra, at 22a. The analytical thread was then dropped, however, when the CSC proceeded to thwart said purpose by

concluding the *rights extended* do not include timely access to a court of law under the judicial remedy afforded. Petitioner's argument that she is being denied equal protection of the laws in a field where the Legislature never intended this result, thus, remains. Reply Brief on the Merits 13.

C. **The Keepers and the Kept**. Another issue under this bureaucratic success story was raised in an Amicus Brief where bias and due process concerns were raised, (Amicus Brief of E. Lyn Lemaire at 5-7); JUSTICE HOLMES famous phrase, "*even a dog distinguished between stumbled over and being kicked,*" quoted, (citation) (Ibid. at 9); and the substantial "*chilling*" effect and sense of hopelessness and futility of reporting violations of law *within* and *outside* the UC discussed. Ibid. at 9-10. These glaring issues were again glossed over by Respondent's counsel, who argued that the "*sweeping assertions of bias are unfounded,*" and that internal procedures "*need not include all of the procedural trappings of formal court proceedings to satisfy constitutional due process requirements.*" Answer to Amicus Brief at 3-4. Furthermore, it was argued that any rule requiring disqualification for pecuniary compensation "*would make it difficult or impossible for the government to provide hearings which it is constitutionally required to hold,*" (Ibid. at 5) - again neglecting to note how very different any autonomous UC campus is from *the government, the government* being bound by clear jurisdictional parameters and substantive and procedural safeguards apparently confined in California to only *three* of its branches.

At best, this story also raises the theme noted by JUSTICE STEVENS and JUSTICE O'CONNOR along with a majority of the Court in Cleavinger v. Saxner (1985) 474 U.S. 193 - the "*old situational problem of the relationship between the keeper and the kept,*" one hardly, "*conducive to a truly adjudicatory performance*" by "*direct subordinates*" of a

warden "*under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.*" Id. at 204.

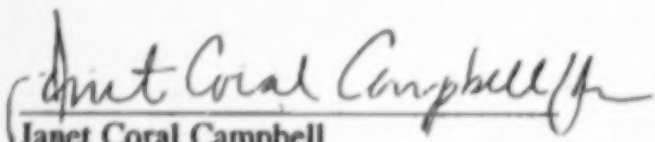
II. CONCLUSION

In view of the serious nature of the allegations and constitutional rights at stake, the judgment below should be reversed not only on the ground that the subject matter was outside Respondent's jurisdiction because it wasn't *exclusively* a university affair but overlapped with a statewide interest requiring uniformity of treatment, but also because the Exhaustion Doctrine shouldn't have been applied to thwart the Legislature's intent to provide a judicial remedy. Even if the Legislature hadn't amended §1102.5, the Exhaustion Doctrine should be inapplicable in view of the lack of substantive and procedural safeguards, as well as inherent bias within each autonomous campus. Finally, this Court should grant this Petition as this is not a case where the resulting denial of equal protection for UC whistleblowers or the "*burden*" of the Lower Courts' error compounded over decades should be placed on the "*shoulders*" of the Cal. Legislature (Monell v. Dept. of Social Services (1978) 436 U.S. 658, 695), which has already acted in attempt to afford UC whistleblowers protection under the law. This is a bureaucratic success story written with the concurrence of the California judiciary which should now be read under the light of the Equal Protection Clause, perhaps affording the opportunity to write a happier or at least more carefully considered ending, which only this Court can provide.

This Court should grant the Petition for Writ of Certiorari.

III. RULE 44.1 CERTIFICATION

Petitioner hereby certifies that the foregoing Petition for Rehearing of *Campbell v. Regents of Univ. of California* No. 05-233 is presented in good faith and not for purposes of delay.



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